

## THE OMINOUS SOUND OF KEYS: ENABLING SEXUAL ASSAULTS IN PRISONS

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*Abstract*

*When incarcerated for crimes for which they have been convicted, prisoners do not expect to be raped by those entrusted with their care, nor to be abandoned by those who have the power and authority to help. But that is what is happening in jails and prisons across the United States. Sexual assault in female correctional institutions in the U.S. costs an estimated \$1 billion per year.<sup>1</sup> The sexual abuse of female inmates at Federal Correctional Institute (FCI) Dublin has been extensive, pervasive, and well-known and documented since the mid-1990's. This article, based on extensive interactions with former inmates, psychologists, guards, and Bureau of Prison officials will take the reader into FCI Dublin. A "content warning" applies as the article contains accounts of sexual assault and sexual abuse. Through the voices of survivors, prison officials and psychologists the reader will understand how the system failed some of the most vulnerable members of our society. On their behalf, and those that suffer a similar fate, we present the argument for Congress to pass federal legislation criminalizing enablers whose role in these terrible crimes demands holding them accountable.*

Keywords: Sexual Abuse; Institutional Abuse; Prison Rape Elimination Act, (PREA); Criminalizing Enablers; Bureau of Prisons (BOP); Financial Impact of Enablers; Federal Correctional Institute Dublin.

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<sup>1</sup> See Table 1 in the Article.

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### INTRODUCTION

*Something that will never leave me is that ominous sound of keys. Imagine the sound of a small chain that hangs from a belt with many, many keys and it just rattles constantly, bouncing against the leg of the person who walks around a place that echoes. We all held our breath no matter if we were in our cells, out in the dayroom, in the showers, or at our assigned workstations when we heard that sound. The anticipation that the officer wearing the keys was coming for us would become relief when the sound passed by us. And the times that the sound would stop in front of us, could trigger an anxiety attack whether we had done something wrong or not. You see, that was the thing. It didn't matter if we hadn't done anything wrong. These oppressors didn't care. They reveled in our terror. They let it feed them.<sup>2</sup>*

This Article addresses how sexual assaults perpetrated by the prison Warden, prison Chaplin, and Guards at the Female Federal Correctional Institution in Dublin, California (“FCI Dublin”) were made possible by the enabling behavior of Prison Guards and other Bureau of Prison (“BOP”) employees. As of publication, there have been eight indictments, seven resulting in guilty verdicts/pleas and another awaiting trial.<sup>3</sup> The former Warden Ray Garcia was found guilty of “seven counts involving sexually abusive conduct against three female victims” who were serving their sentence at FCI Dublin.<sup>4</sup> The former prison Chaplin, James

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<sup>2</sup> This Article is the result of a conversation between the contributor of this passage and one of the authors. Contributor is Michelle J., a former inmate at FCI Dublin (not her real name as she has asked to remain anonymous) (correspondence on file with authors).

<sup>3</sup> See *United States v. HighHouse*, Information No. 4:22-cr-00016-HSG (N.D. Cal, 2022) (on file with authors); *United States v. Klinger*, Plea Agreement No. 22-CR-00031 YGR (N.D. Cal, 2022) (on file with authors); *United States v. Smith*, Indictment No. 23-0110 AMO (N.D. Cal, 2023) (on file with authors); *United States v. Garcia*, Superseding Indictment No. 4:21-cr-00429-YGR (N.D. Cal, 2022) (on file with authors); *United States v. Bellhouse*, Criminal Complaint No. 4:21-mj-71905-MAG (N.D. Cal, 2021) (on file with authors); *United States v. Jones*, Plea Agreement No. 4:23-CR-00212 HSG (N.D. Cal, 2023) (on file with authors); *United States v. Chavez*, United States’ Sentencing Memorandum No. 22-CR-00104 YGR (N.D. Cal, 2023) (on file with authors); *United States v. Nunley*, Plea Agreement No. 4:23-CR-00213 HSG (N.D. Cal, 2023) (on file with authors); see also Lisa Fernandez, *8 Correctional Officers Now Charged with Sex Abuse at FCI Dublin; 7 Found Guilty*, KTVU FOX 2 (2023), <https://www.ktvu.com/news/8-correctional-officers-now-charged-with-sex-abuse-at-fci-dublin-7-found-guilty> (last visited Jan 27, 2024).

<sup>4</sup> Office of Public Affairs | Jury Convicts Former Federal Prison Warden for Sexual Abuse of Three Female Inmates | United States Department of Justice, (2022), <https://www.justice.gov/opa/pr/jury-convicts-former-federal-prison-warden-sexual-abuse-three-female-inmates> (last visited Feb 13, 2024).

Highhouse, plead guilty “to five felonies for sexually abusing a female inmate and subsequently lying to federal agents during their investigation.”<sup>5</sup>

From the outside, FCI Dublin looks like any other prison. It is a cluster of brown dull buildings surrounded by barbed wire fences. FCI Dublin consists of a “low-level security federal correctional institution with an adjacent minimum security satellite camp.”<sup>6</sup> FCI Dublin only houses female inmates; for that reason, this Article focuses on sexual assault and abuse of female inmates.<sup>7</sup> There have been numerous complaints of sexual assault at FCI Dublin over the years.<sup>8</sup> Three female inmates sued the BOP in 1996, “alleging that they were ‘sold like sex slaves’ by correctional officers.”<sup>9</sup> According to an Associated Press article no arrests were made, and the BOP settled the matter for \$500,000.<sup>10</sup>

Inmates are the essence of an at-risk population. Their movements, rights, and freedoms are limited while they are institutionalized.<sup>11</sup> As the material we

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<sup>5</sup> Office of Public Affairs | Former Bureau of Prisons Chaplain Pleads Guilty to Sexual Assault and Lying to Federal Agents | United States Department of Justice, (2022), <https://www.justice.gov/opa/pr/former-bureau-prisons-chaplain-pleads-guilty-sexual-assault-and-lying-federal-agents> (last visited Feb 13, 2024).

<sup>6</sup> FCI Dublin, <https://www.bop.gov/locations/institutions/dub/> (last visited Feb 4, 2024). (Official FCI Dublin BOP internet page). See *infra* appendix A for ariel view of FCI Dublin.

<sup>7</sup> This is due to the scope of the Article; while we understand sexual assault is a serious issue in male facilities, we do not address it in this Article.

<sup>8</sup> STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 117TH CONG., REP. ON SEXUAL ABUSE OF FEMALE INMATES IN FEDERAL PRISONS 7 (Subcomm. Print 2022) [hereinafter PSI REPORT]; See *Lucas v. White*, 96-cv-2905-TEH (N.D. Cal. 1997); *United States v. Accursi*, 4:97-cr-40101 (N.D. Cal.); *United States v. Hyson*, 4:99-cr-40031 (N.D. Cal.); *United States v. Hawthorne*, 4:99-cr-40051 (N.D. Cal.); *United States v. Donaldson*, 4:02-cr-40153 (N.D. Cal.); *United States v. Rodarte*, 4:02-cr-40153 (N.D. Cal.). See also Michael R. Sisak and Michael Balsamo, *Abuse-clouded prison gets attention, but will things change?*, AP News (May 5, 2022) (<https://apnews.com/article/business-prisons-california-sexual-abuse-only-on-ap-3a4db9ab478bfdd545ef3c7e08cd273b>).

<sup>9</sup> *Lucas v. White*, 63 F. Supp. 2d 1046 (N.D. Cal. 1999), JUSTIA LAW (2024), <https://law.justia.com/cases/federal/district-courts/FSupp2/63/1046/2456579/> (last visited Feb 3, 2024).; Michael Sisak & Michael Balsamo, *Abuse-Clouded Prison Gets Attention, but Will Things Change?*, AP NEWS (2022), <https://apnews.com/article/business-prisons-california-sexual-abuse-only-on-ap-3a4db9ab478bfdd545ef3c7e08cd273b> (last visited Jan 22, 2024).

<sup>10</sup> *Lucas, Et Al., v. White, Et Al.*, Private Settlement agreement, 15:8 (N.D. Cal, 1998) (on file with authors).

<sup>11</sup> Samiera Saliba, *Rape by the System: The Existence and Effects of Sexual Abuse of Women in United States Prisons*, 10 HASTINGS RACE & POVERTY L.J. 293 (2013) (Discussing how male prison guards have complete control over the lives of female inmates).

reviewed makes clear, inmates are subject to the whims of predators who view them as nothing more than sexual prey.<sup>12</sup>

This Article makes the argument that without enablers, the acts of the perpetrators would not have occurred and continue to occur unabated. Enablers in this article are defined as those who knew what was happening, could have done something to prevent it, but chose to ignore the safety and wellbeing of the prisoners under their care and protection.<sup>13</sup> Our purpose in this undertaking is two-fold: to understand and explain how enabling behavior causes harm and to describe current legal remedies available to victims, while recommending new legislation and proposing enhancements to existing federal legislation that addresses sexual assault committed by guards in prisons today.

The words of Congressman Mark DeSaulnier (D-Cal) are encouraging for those who seek justice:<sup>14</sup>

*The reported violations of constitutional rights, culture of sexual abuse, and failure to provide basic health services at FCI Dublin are unjust and unacceptable. While I cannot comment on the validity of accusations against enablers, anyone who is found to have been involved should be held accountable to the fullest extent of the law. In Congress, I have been conducting federal oversight of this matter to ensure humanity and basic dignity are upheld in our prison system and I will be continuing this work as long as necessary*<sup>15</sup>

To fully appreciate the scope and severity of the harm caused by enablers to the inmates, we focus on how complaints against prison officials were investigated. In examining numerous investigations, we were particularly concerned with the following issues:

- Length of the investigations;
- How the investigations were conducted;
- Which prison officials were entrusted with the investigations;
- To whom the findings were reported;

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<sup>12</sup> See Erin Daly et al., *Women's Dignity, Women's Prisons: Combatting Sexual Abuse in America's Prisons*, 26 CUNY LAW REVIEW 260 (2023) ("Victims of staff sexual abuse are in the custody of and entirely dependent on those who commit violence against them and those who turn a blind eye to their abuse").

<sup>13</sup> See generally AMOS N. GUIORA, *ARMIES OF ENABLERS: SURVIVOR STORIES OF COMPLICITY AND BETRAYAL IN SEXUAL ASSAULTS* 15 (2020).

<sup>14</sup> As FCI Dublin is in Congressman DeSaulnier's District we reached out to his office and had several email exchanges with his staff. We thank them for their cooperation.

<sup>15</sup> Email from Mairead Glowacki-Press Secretary for Congressman DeSaulnier on September 27, 2023 (correspondence on file with authors).

- Lack of requisite follow-up;
- Lack of independence of the investigation;
- How information was shared with investigators.

Over the course of many months, we have directly engaged with a wide range of individuals, including prison staff, individuals who held command positions in prisons, subject matter experts, attorneys who represent the inmates, representatives of elected officials, journalists, spokesmen from the Department of Justice, and the Bureau of Prisons.<sup>16</sup> In addition, we carefully reviewed court transcripts and government documents. We did not meet with any of the victims.<sup>17</sup>

What follows is a case for criminalizing the enabler. Section (I) defines what an enabler is, (II) gives an overview of the Prison Rape Elimination Act and why it is not being implemented in the way intended, (III) gives the reader the opportunity to read the words of individuals who experienced the toxic environment at FCI Dublin, (IV) gives an overview of the investigative process and its failures, (V) identifies an enabler at FCI Dublin, Lieutenant Stephen Putnam, (VI) addresses the scope of sexual abuse in correctional facilities across the United States, (VII) quantifies the harm in monetary terms, caused by enablers and perpetrators, (VIII) recommends legislation that should be introduced as well as recommending changes to current legislation.

## I. Defining Enablers

Research into the motives of enablers reveals the complicated nature of this phenomenon in many American institutions.<sup>18</sup> By looking away or lying about reports of abuse, enablers shield perpetrators from legal scrutiny.<sup>19</sup> For this they must be held criminally accountable. In demanding accountability, the challenges are two-fold: Institutions must be able to identify the enablers in their midst, and strong legal mechanisms must be employed for holding them accountable.

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<sup>16</sup> All interactions have been documented, with notes and/or recordings, with the individual's consent. We are very grateful for their time, candor, insight, and willingness to engage on a difficult and uncomfortable issue. We honored requests for anonymity as we understood some of the conversations must be "off the record."

<sup>17</sup> To make the legal argument in this Article, we relied on available information and court transcripts. We did not feel the need to impose on the lives of the victims and survivors in these cases.

<sup>18</sup> See generally Amos Guiora et al., *Holding Enablers of Child Sexual Abuse Accountable: The Case of Jeremy Bell | Secondary Sources | National | Westlaw Precision*, 59 CRIMINAL LAW BULLETIN (2023),

[https://1.next.westlaw.com/Document/Ie99000172c6d11ee97fbd9812c078ed6/View/FullText.html?VR=3.0&RS=cblt1.0&\\_\\_lrTS=20240128033911397&transitionType=Default&contextData=%28sc.Default%29](https://1.next.westlaw.com/Document/Ie99000172c6d11ee97fbd9812c078ed6/View/FullText.html?VR=3.0&RS=cblt1.0&__lrTS=20240128033911397&transitionType=Default&contextData=%28sc.Default%29) (last visited Jan 27, 2024).; See generally Guiora, supra note 13.

<sup>19</sup> See PSI REPORT supra note 8, at 1 ("BOP management failures enabled continued sexual abuse of female prisoners by BOP's own employees.").

An enabler is an individual in a position of authority who is aware that a vulnerable person is being abused, or harmed in some way, yet chooses to not act on their behalf.<sup>20</sup> This act of turning away is well-known in the psychological literature as an attempt to protect the predator and/or the institution, that employs both predator and enabler and has inculcated both into a culture of loyalty.<sup>21</sup> It becomes clear that “the more staff sexual abuse occurs and the more openly it occurs, the more people are involved in perpetrating it and protecting the perpetrators, and the circle of those invested in covering it up expands.”<sup>22</sup>

The American Psychological Association defines an enabler as someone who:

contributes to continued maladaptive or pathological behavior (e.g., child abuse, substance abuse) in another person. The enabler is typically an intimate partner or good friend who passively permits or unwittingly encourages this behavior in the other person; often, the enabler is aware of the destructiveness of the person’s behavior but feels powerless to prevent it<sup>23</sup>

When examining why to hold enablers accountable, the deterrence factor inherent to criminal codes and civil tort actions may provide a path forward, for absent penalties of prosecution, or monetary settlements, there would be no reason for enablers to change their behavior.

## II. Prison Rape Elimination Act (PREA)

“PREA does not exist in Dublin”<sup>24</sup>

- Melissa, a victim and former inmate

“To me the BOP is an epic fail in terms of the way they handle PREA – the system is flawed and broken”<sup>25</sup>

- Victim and former inmate

<sup>20</sup> See Guiora, *supra* 13; see also Guiora, *supra* 18.

<sup>21</sup> Fischer P, Krueger JI, Greitemeyer T, Vogrincic C, Kastenmüller A, Frey D, Heene M, Wicher M, Kainbacher M. The bystander-effect: a meta-analytic review on bystander intervention in dangerous and non-dangerous emergencies. *Psychol Bull.* 2011 Jul;137(4):517-37. doi: 10.1037/a0023304. PMID: 21534650

<sup>22</sup> Daly et al., *supra* note 15.

<sup>23</sup> Am. Psych. Ass’n, Enabling, in APA DICTIONARY OF PSYCHOLOGY <https://dictionary.apa.org/enabling> [<https://perma.cc/KK9M-6BXW>] (last visited Feb. 2, 2024).

<sup>24</sup> *United States v. Garcia*, No. CR 21-00429-YGR (N.D. Cal., 2022), vol 3 402:25 [hereinafter *Garcia* Crim. Trial Tr.] (on file with authors).

<sup>25</sup> Victim impact statements at 29, *United States v. HighHouse*, United States’ Sentencing Memorandum and Motion for Upward Departure or Upward Variance No. 22-cr-000016-HSG (N.D. Cal., 2022) (on file with authors).

In response to widespread sexual abuse in American correctional facilities, the Prison Rape Elimination Act (“PREA”) was passed unanimously by Congress in 2003.<sup>26</sup> The Act intends to “provide for the analysis of the incidence and effects of prison rape in federal, state, and local institutions and to provide information, resources, recommendations, and funding to protect individuals from prison rape.”<sup>27</sup>

The National Prison Rape Elimination Commission (NPREC), an implementation arm of PREA, was mandated with drafting standards for eliminating prison rape that went into effect on August 20, 2012.<sup>28</sup>

PREA standards include a “zero tolerance policy of sexual abuse and sexual harassment.”<sup>29</sup> This includes guidelines for the proper training of staff<sup>30</sup> and inmates,<sup>31</sup> and using various reporting modalities for sexual abuse<sup>32</sup> including at least one option for reporting to an outside entity.<sup>33</sup> In addition, PREA requires “all staff to report immediately . . . any knowledge, suspicion, or information regarding an incident”<sup>34</sup> then for the agency to “ensure that an administrative or criminal investigation is completed for all allegations of sexual abuse or sexual harassment.”<sup>35</sup>

PREA requires each facility undergo a “PREA audit” every three years,<sup>36</sup> which determines if the standards are exceeded, met, or not met.<sup>37</sup> When an agency is not

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<sup>26</sup> Prison Rape Elimination Act, 34 U.S.C. ch. 301 (2018); *See generally* Brenda V Smith, *Promise Amid Peril: PREA’s Efforts To Regulate An End To Prison Rape*, 57 AMERICAN CRIMINAL LAW REVIEW; Brenda V Smith, *The Prison Rape Elimination Act: Implementation and Unresolved Issues Torture*, 3 AMERICAN UNIVERSITY CRIMINAL LAW BRIEF (2008) (discussing the implementation of PREA and issues that were yet to be resolved at the time of its enactment).

<sup>27</sup> The Prison Rape Elimination Act was originally codified in 2003 as 42 U.S.C. §§ 15601-09. It has since been editorially reclassified as 34 U.S.C. §§ 30301-09.

<sup>28</sup> 34 U.S.C. § 30306(a)–(c) (2018); Prison Rape Elimination Act National Standards, 28 C.F.R. § 115 (2019).

<sup>29</sup> Prison Rape Elimination Act National Standards, 28 C.F.R. § 115.11.

<sup>30</sup> 28 C.F.R. § 115.31; *see also* U.S. DEPT OF JUST. FED. BUREAU OF PRISONS, PROGRAM STATEMENT NO. 5324.12, SEXUALLY ABUSIVE BEHAVIOR PREVENTION AND INTERVENTION PROGRAM 9 (2015) [hereinafter PROGRAM STATEMENT 5324.12].

<sup>31</sup> 28 C.F.R. § 115.33; *see also* PROGRAM STATEMENT 5324.12, *supra* note 30, at 26.

<sup>32</sup> 28 C.F.R. § 115.51; *see also* PROGRAM STATEMENT 5324.12, *supra* note 30, at 35.

<sup>33</sup> *Id.* at (b).

<sup>34</sup> 28 C.F.R. § 115.61(a); *see also* PROGRAM STATEMENT 5324.12, *supra* note 30, at 37.

<sup>35</sup> 28 C.F.R. § 115.22(a); *see also* PROGRAM STATEMENT 5324.12, *supra* note 30, at 24.

<sup>36</sup> 28 C.F.R. § 115.401(a); *see also* PROGRAM STATEMENT 5324.12, *supra* note 30, at 57.

<sup>37</sup> 28 C.F.R. § 115.403(c); *see also* PROGRAM STATEMENT 5324.12, *supra* note 30, at 59.



in compliance then the auditor will work with the agency to help them become compliant with the standards.<sup>38</sup> PREA auditors are certified by the Department of Justice (DOJ), although the DOJ does not employ them.<sup>39</sup> The individual institutions are responsible for contracting with a certified auditor to conduct the audit.<sup>40</sup>

However, providing a set of guidelines and best practices with no additional enforcement powers does not ensure compliance. In her December 13, 2022, Senate testimony, Professor Brenda Smith,<sup>41</sup> an acknowledged PREA expert, said: “In reality, auditors work for the very agencies they audit, making independence difficult. This creates a financial disincentive to identify problems.”<sup>42</sup> On September 13<sup>th</sup>, 2023, Director of the BOP, Collete Peters testified there had not been any changes to how facilities contract for PREA audits.<sup>43</sup>

According to a 2022 PREA audit FCI Dublin met all the required standards,<sup>44</sup> even though allegations of sexual misconduct went uninvestigated for months, if not years.<sup>45</sup> In a September 13, 2023, Senate hearing, Senator Jon Ossoff (D-GA) expressed concern to Director Peters, that PREA audits were not detecting sexual abuse in prisons. Director Peters responded, “unfortunately, PREA does not predict future behavior.”<sup>46</sup>

### III. Power and Abuse in FCI Dublin

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<sup>38</sup> 28 C.F.R. § 115.404; *see also* PROGRAM STATEMENT 5324.12, *Supra note* 30, at 60.

<sup>39</sup> Who are PREA auditors? | PREA, (2024), <https://www.prearesourcecenter.org/audit/prea-auditors> (last visited Jan 4, 2024).; *see generally* National PREA resource center, *PREA Auditor Handbook Version 2.1*, (2022), <http://www.prearesourcecenter.org/audit/prea-auditors/auditor-handbook>.

<sup>40</sup> *Id.*; *see also* 28 C.F.R. §115-93-115.405.

<sup>41</sup> Brenda V. Smith - Faculty, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, <https://www.wcl.american.edu/community/faculty/profile/smith/> (last visited Jan 24, 2024).

<sup>42</sup> Sexual Abuse of Female Inmate in Federal Prisons: Before The Permanent Subcommittee on Investigations of the Committee on Homeland Security and Governmental Affairs United States Senate, 117<sup>th</sup> Cong. 11 Transcript at 11 (2022)(<https://www.hsgac.senate.gov/wp-content/uploads/CHRG-117shrg50239.pdf>).

<sup>43</sup> Oversight of the Federal Bureau of Prisons | United States Senate Committee on the Judiciary, (2023), <https://www.judiciary.senate.gov/committee-activity/hearings/09/13/2023/oversight-of-the-federal-bureau-of-prisons> (last visited Jan 27, 2024).

<sup>44</sup> Prison Rape Elimination Act (PREA) Audit Report FCI Dublin, FEDERAL BUREAU OF PRISONS (2023), [https://www.bop.gov/locations/institutions/dub/dub\\_prea.pdf?v=1.0.0](https://www.bop.gov/locations/institutions/dub/dub_prea.pdf?v=1.0.0) (last visited Dec 30, 2023) [hereinafter Dublin PREA Audit].

<sup>45</sup> *See* Section V.

<sup>46</sup> Oversight of the Federal Bureau of Prisons | United States Senate Committee on the Judiciary. at 1:10:31.

In U.S. federal prisons, there is a power structure that fosters, empowers, and enables abuse.<sup>47</sup> The following sheds light on FCI Dublin's power structure from three different perspectives: inmates, a psychologist, and a guard.

### A. Inmates

Prison is hard. Ask any inmate. However cruel and unusual punishment cannot, and should not, be part of the prison experience.<sup>48</sup> Nothing can justify the sexual assault the inmates at FCI Dublin were subjected to.

Psychological, physical, and emotional abuse were a frequent experience among the women incarcerated at FCI Dublin.<sup>49</sup> This was the antithesis of what the BOP intended in their policy. According to the Department of Justice:

The mission of the BOP is to protect society by confining offenders in the controlled environments of prisons and community-based facilities that are safe, humane, cost-efficient, and appropriately secure and that provide work and other self-improvement opportunities to assist offenders in becoming law-abiding citizens.<sup>50</sup>

For years, abusers were allowed to continue their illegal activities because of the enabling behavior of BOP employees.<sup>51</sup> One inmate incarcerated at FCI Dublin who has chosen to go by the name Michelle J., shared her experience with us; the following seven passages are excerpts from that discussion.<sup>52</sup>

1. *Hope is the most valuable commodity inside of a prison. Once hope is taken from you, you don't end up doing your time; your time ends up doing you. Fear, on the other hand, is the kryptonite of hope, and every woman who lives in that space is filled with fear. We all were facing an internal battle between hope and fear and the men and women who were charged with being our captors exploited that fear to control us. Were there nice, kind*

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<sup>47</sup> See Daly et al., *supra* note 12.; Saliba, *supra* note 11.

<sup>48</sup> U.S. Const. amend. VIII.

<sup>49</sup> See Michael Sisak & Michael Balsamo, *AP Investigation: Women's Prison Fostered Culture of Abuse*, AP NEWS (2022), <https://apnews.com/article/prisons-california-united-states-sexual-abuse-only-on-ap-d321ae51fe93dfd9d6e5754383a95801> (last visited Jan 22, 2024).

<sup>50</sup> Department of Justice | Federal Bureau of Prisons | United States Department of Justice, December 6, 2022. <https://www.justice.gov/doj/federal-bureau-prisons>.

<sup>51</sup> See PSI REPORT *Supra* note 6 at 1 ("BOP management failures enabled continued sexual abuse of female prisoners by BOP's own employees").

<sup>52</sup> Michelle J., *supra* note 2; See *Infra* Appendix B for full statement.

*officers inside? Absolutely there were, but they were few and far between.*<sup>53</sup>

Fear was used to manipulate, subdue, and coerce inmates, including the psychological abuse explained below.<sup>54</sup>

2. *One of the ways officers used to capitalize on our fears was that they read our pre-sentencing reports. These reports were compiled before entering prison. Confidential and personal information that was not meant for outside eyes was being used by officers against inmates. There is nothing more bone-chilling than having an officer come up behind you and whisper in your ear the names that they should not have known from your past that you have tried like hell to forget. Some used that information to threaten loved ones on the outside. Others used it to blackmail inmates. It was mental warfare, and they held all the weaponry. They preyed upon the weak and punished the strong. No one was immune.*<sup>55</sup>

Leveraging inmates' personal lives and pasts is an invasion of privacy and unnecessary for officers to do their job. These acts are an abuse of power, which is the essence of the relationship between inmates and guards.

3. *You see, that was the thing. It didn't matter if we hadn't done anything wrong. These oppressors didn't care. They reveled in our terror. They let it feed them. Some got off on it, which then made them even more dangerous, with many of them acting out once they got that rush.*<sup>56</sup>

Officers used their positions, personal connections, and professional status to abuse with virtual immunity.

4. *As these officers are considered government officials, they are protected via qualified immunity. This means if it is alleged that one of these officials violated the rights of an individual, a suit is only allowed if it violated a clearly established statutory or constitutional right, even if it was malicious in nature.*<sup>57</sup>

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<sup>53</sup> *Id.*

<sup>54</sup> *See also* Saliba, *supra* note 11 at 300 (“The effects of sexual abuse of women inside are wide ranging from enduring physical, psychological, and psychosomatic trauma to experiencing distortion of reality and feelings of hopelessness”).

<sup>55</sup> Michelle J., *Supra* note 2.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

The power structure dictated interactions between guards and inmates, which the abusers made clear to the victims.

5. *A very common taunt was, "Who are they going to believe? Me or a fucking scumbag felon like you?" They got away with so much under this stupid umbrella.*<sup>58</sup>

Officers subjected inmates to cruel taunting, public menstrual shaming, and physical and sexual abuse.<sup>59</sup>

6. *So aside from the sheer dickishness of doing that just to stick [it] to an inmate they didn't like, they couldn't get in trouble even if it was discovered that they did so. Qualified immunity gave them a cloak of invincibility and actively encouraged them to act with impunity.*<sup>60</sup>

Inmates who appeared to be "stronger" became targets for officers to humiliate and shame. Inmates deemed "fragile" would often be subjected to sexual harassment and abuse. Both psychological and physical abuse have lasting mental, social, sexual, physical, and emotional consequences on the victim.<sup>61</sup>

7. *And as a survivor, I can tell you that [sexual abuse] has impacted me in ways that I will never shake. You learn that sexual assault is not so much about sex, but about power. So being forced to live in an environment where the majority of those charged to control your every move are men who thrive on their power adds a whole new level of terror. The threat of that happening again by men who consider you inhuman was always front of mind. I was not alone in my experience among this group of women. Out of every inmate I spoke to about this topic (I can easily say in a prison of roughly 175 women, I easily talked to at least 100, maybe more), only one had NOT experienced the trauma of violent sexual assault in her lifetime.*<sup>62</sup>

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> Saliba, *supra* note 11.

<sup>62</sup>Michelle J., *Supra* note 2; *see also* ELIZABETH SWAVOLA ET AL., VERA INST. OF JUST., OVERLOOKED: WOMEN AND JAILS IN AN ERA OF REFORM 11 (2016) (finding that 86% of incarcerated women reported experiencing sexual violence prior to their imprisonment).

While this inmate was not sexually abused at FCI Dublin, she expressed a “motherly protection” over her fellow inmates.<sup>63</sup> They were a family, a sisterhood.<sup>64</sup> She also endured an environment of toxicity, abuse, and terror.

The harm caused does not end with the physical attacks, as expressed by a victim of former Warden Garcia. She continued to suffer harm after reporting the assault.

*I have anxiety. I can't sleep. I live in fear every single day. I don't know if I'm going to live, you know? Like, it's been horrible. It's been horrible. It's been the scariest thing that I've ever done. And living inside of those prisons, not anybody in this room can understand, nobody, unless you are in these clothes and behind a fence. They play God with your life. They control it. And I've gone through that for 11 years that I've been in prison. They talk bad about me, and because I did come forward, people say things to me. People talk about me. I've had cops, like, threaten me and say that everything is my fault.<sup>65</sup>*

Inmates were often dehumanized, treated as if incarcerated solely for the pleasure of the individuals who abused them.<sup>66</sup>

*I was not seen as a name or a number to the Government but as a sexual play toy or a piece of meat, while I was used, degraded, humiliated, and sexually abused to gratify their sexual desires. I understand I made a bad choice, which put me in prison, and that's in the past, and I've done everything I can and so many classes to better myself that I can assure you my sentence did not come with a clause to include being sexually abused by prison staff multiple times and multiple staff members causing me PTSD, mental and emotional anguish, and more.<sup>67</sup>*

These experiences and stories illuminate the environment and dehumanization of inmates. They stood no chance against either those who abused them or those who enabled their abusers.

## **B. Psychologists**

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<sup>63</sup> Michelle J., *Supra* note 2.

<sup>64</sup> *Id.*

<sup>65</sup> Garcia Crim. Trial Tr., *supra* note 24 at vol.2 329:7-19.

<sup>66</sup> See also Sharon Dolovich, *The Failed Regulation and Oversight of American Prisons*, 5 ANNU. REV. CRIMINOL. 153 (2022) (discussing how inmates are dehumanized).

<sup>67</sup> Garcia Crim. Trial Tr., *supra* note 21 at Sentencing 31:21-25, 32:1-5.

Psychologists are mandatory reporters, ethically and legally obligated to report any abuse or concerns shared with them.<sup>68</sup>

We spoke with a former psychologist at FCI Dublin, who explained the toxic environment and common knowledge of abuse.<sup>69</sup> The following three passages are from the same psychologist.

1. *The toxicity at FCI Dublin was not so blatant as it is now. It was much more subtle when I first started. I came into FCI Dublin from various other forensic and correctional sites, so I was well aware of the tremendous power dynamic that exist[s] between staff and those incarcerated, and the mistreatment of inmates in varying degrees....There was always the talks of the chaplain and "Dirty Dick," and various staff members for their attitudes towards inmates that yelled or are just inappropriate to be an officer at FCI Dublin. Weirdly, when these staff members were discussed, it seemed it was common knowledge of their behaviors and tendencies, but it seemed it was "normal."*<sup>70</sup>

In the cases when a psychologist demonstrated concern and reported the allegation, the following often occurred:

2. *Ironically, when an inmate is placed on a 5150<sup>71</sup> for self-harm, the staff member that is observing the inmate on suicide watch could, and most likely, be the same staff member that caused distress or the inmate has expressed concern of harassment. If there is a "good" lieutenant on duty, I could usually express my concerns and the staff member will be replaced. However, it is often overlooked or the common excuse if there is no other staff member available due to staff shortage.*<sup>72</sup>

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<sup>68</sup> 28 C.F.R. § 115.61(c); *see also* PROGRAM STATEMENT 5324.12, *supra* note 30 at 38.

<sup>69</sup> Email correspondence with anonymous FCI Dublin former psychologist (correspondence on file with authors) [hereinafter Psychologist].

<sup>70</sup> *Id.*

<sup>71</sup> Mental Health Holds, BULLETPPOINTS PROJECT, <https://www.bulletpointsproject.org/mental-health-holds/> (last visited Feb 5, 2024). ("In California, law enforcement officers and mental health professionals can place a patient on an emergency 72-hour hold, or "5150", if, due to a mental illness, they are determined to pose a danger to themselves (DTS), a danger to others (DTO), or they are "gravely disabled" (GD).").

<sup>72</sup> Psychologist, *supra* note 69.

According to the psychologist, some officers were promoted notwithstanding their toxic behavior:

3. *The common consensus at the Bureau that I was introduced to and exposed to fairly often was, “if there is a staff that you have a problem with, promote them so they move on and be someone else’s problem.”.... There appeared to be a culture of appreciate staff that are commonly known to be problems. One staff member who is known to yell and harass inmates was awarded officer of the year. A captain who was known to having an affair with a direct report was promoted to regional staff. A warden who was known to be drinking on the job was promoted to a higher pay scale and higher executive position. The list goes on..... The cliché, “it’s about who you know,” is embodied in the Bureau. If you are friends with the warden, you were protected. If you have friends in DC, you will get to run your own institution. The staff that came in to replace all the supervisors that were sent out were hand-picked by regional staff and the replacement warden.<sup>73</sup>*

### C. Guards

When recalling certain aspects of FCI Dublin culture at the beginning of this guards career, she fondly referred to conditions at the prison as being an “atmosphere like a family.”<sup>74</sup> Staff, particularly custody and corrections officers, were close to one another and conducted regular meetings among the other divisions within FCI Dublin.<sup>75</sup> In the early years of this guard’s career, the prison maintained a level of professionalism that disintegrated over the course of time.<sup>76</sup>

*From the outside, you’d never know the darkness inside that place. There are good people that work there. Unfortunately, there is a union that ensures the corruption and abuses continue. There is a power structure that doesn’t allow for competent leadership. The agency puts a deputy regional director in place following him pleading guilty to a misdemeanor. They send Dublin an Associate Warden who was just arrested for a DUI and Careless Driving, yet blame the supervisors for their leadership failures. The abuses still*

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<sup>73</sup> *Id.*

<sup>74</sup> Tess Korth, former Unit Manager at FCI Dublin (email correspondence on file with authors).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

*continue. The floors shine, the dog and pony shows continue, the director talks about transparency behind many coverups, and the failures at the top will get their bonuses. But, the inmates behind the walls at Dublin continue to be abused even when they smile at the visitors and answer the questions the right way. They have no choice because they must live with the abusers.<sup>77</sup>*

The excerpts from the psychologist and guard above highlight not only the presence of individual enablers but also suggest a systemic nature to the enabling.

#### **IV. Investigative Process**

Failures in the investigative process are a core component in the harms caused by enablers. In addition to PREA and BOP policies, prisons have internal guidelines for reporting abuse and misconduct.<sup>78</sup> Below we discuss the prison investigatory processes and how it is supposed to be implemented. We also discuss the difficulty that inmates have with reporting, and their distrust in the supposed anonymity of their reports.

##### **A. Prison Reporting Mechanisms**

In the event of alleged misconduct within a facility, employees generally<sup>79</sup> adhere to an established chain of command for reporting such conduct to their immediate superiors.<sup>80</sup> While it remains within the discretion of staff members to deviate from the chain of command for reporting misconduct, the complaint must ultimately be reported to the Warden.<sup>81</sup> According to BOP policy:

In the event that a staff member is alleged to have perpetrated sexually abusive behavior against an inmate, the Warden is notified immediately. The Warden notifies the Regional

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<sup>77</sup> *Id.*

<sup>78</sup> See generally Federal Correctional Institution Dublin Inmate Admission & Orientation Handbook, (2023), [https://www.bop.gov/locations/institutions/dub/dub\\_ao-handbook.pdf?v=1.0.2](https://www.bop.gov/locations/institutions/dub/dub_ao-handbook.pdf?v=1.0.2) [hereinafter Inmate Handbook].

<sup>79</sup> We spoke with several former guards at FCI Dublin who expressed they usually would report to their superior officer.

<sup>80</sup> U.S. DEPT OF JUST. FED. BUREAU OF PRISONS, PROGRAM STATEMENT NO. 3420.11 STANDARDS OF EMPLOYEE CONDUCT (2013) at 2 (“Employees will immediately report any violation, or apparent violation, of standards of conduct to their Chief Executive Officer (CEO) or another appropriate authority.”).

<sup>81</sup> PROGRAM STATEMENT 5324.12, *supra* note 30 (describing the Wardens responsibility in every situation of misconduct in their facility).



Director and the Office of Internal Affairs (OIA),<sup>82</sup> who in turn notify the Office of the Inspector General (OIG),<sup>83</sup> and, when appropriate, the Federal Bureau of Investigation (FBI)<sup>84</sup>

Most federal prisons have a Special Investigative Services (“SIS”) office,<sup>85</sup> tasked with investigating allegations of staff on inmate or inmate on inmate misconduct in the prison.<sup>86</sup> FCI Dublin is one of the prisons that has an SIS office. As part of our research, we attempted to access the SIS handbook to understand the investigative guidelines. What we were able to obtain is heavily redacted,<sup>87</sup> the full contents under a protective order since 2012.<sup>88</sup>

A former lieutenant with whom we spoke, explained the investigatory process after submission of a report to SIS:

*When a report is made, you pull the inmate into the office to get the basics of what happened, and then the SIS officer would brief the Warden or the on-call Associate Warden if the*

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<sup>82</sup> “The OIA investigates allegations of employee misconduct and monitors and approves investigations conducted by local BOP investigators at the institutions.” See OIG, *Evaluation and Inspection Report: Review of the Federal Bureau of Prisons’ Disciplinary System*, (2004), <https://oig.justice.gov/reports/BOP/e0408/results.htm> (last visited Feb 3, 2024).

<sup>83</sup> The Office of the Inspector General (OIG) in the U.S. Department of Justice (DOJ) is a statutorily created independent entity whose mission is to detect and deter waste, fraud, abuse, and misconduct in the Department of Justice, and to promote economy and efficiency in the Department’s operations. see About the Office, <https://oig.justice.gov/about> (last visited Feb 5, 2024).

<sup>84</sup> PROGRAM STATEMENT 5324.12, *supra* note 30 at 44.

<sup>85</sup> DOJ, *Limited-Scope Review of the Federal Bureau of Prisons’ Strategies to Identify, Communicate, and Remedy Operational Issues* (2023) (“as of July 2022 the BOP had approximately 60 SIAs nationwide to conduct investigations at the BOP’s 121 institutions.”).

<sup>86</sup> THE FEDERAL BUREAU OF PRISONS’ MONITORING OF MAIL FOR HIGH RISK INMATES, report I-2006-009 (explanation of SIS job duties) (<https://oig.justice.gov/reports/BOP/e0609/app2.htm>).

<sup>87</sup> DEPT OF JUST. FED. BUREAU OF PRISONS, SPECIAL INVESTIGATIVE SUPERVISORS MANUAL NO. 1380.11, CN-1(2016) ( [https://www.nacdl.org/getattachment/43f59474-8bdd-4834-81f4-8641ef8642c0/2020-05-19\\_inmateemail\\_bopproduction10.pdf](https://www.nacdl.org/getattachment/43f59474-8bdd-4834-81f4-8641ef8642c0/2020-05-19_inmateemail_bopproduction10.pdf).) (last visited Feb 5, 2024); See also DEPT OF JUST. FED. BUREAU OF PRISONS, SPECIAL INVESTIGATIVE SUPERVISORS MANUAL NO. 1380.11, CN 1(2016) (<https://www.law.berkeley.edu/wpcontent/uploads/2021/01/BOPRecord-ChangeNotice1380.11CN1-SpecialInvestigativeSupervisorsManual.pdf>) (last visited Feb 5, 2024).

<sup>88</sup> *United States v. Watland*, Criminal Action No. 11-cr-00038-JLK-CBS (D. Colo. Jun. 20, 2012).

*Warden is not there. The decision about what happens next lies with the Warden*<sup>89</sup>

When asked how long it should take to initiate investigating, the former Lieutenant said “SIS should start the process immediately” after a submission of a report.<sup>90</sup> The guard emphasized the similarity between SIS at FCI Dublin to SIS at other federal correctional institutions.

In addition, we corresponded with a former Warden from a different correctional institution who shared the reporting process with us:

*SIS briefs the warden. Warden decides whether the alleged misconduct gets sent to OIA or remains with SIS. Wardens are supposed to use sound correctional judgement in deciding whether it gets referred to OIA. All allegations which are criminal in nature are required to be sent to OIA who then is required to send to OIG. At the outcome of all investigations, a packet of findings and proposed disciplinary action is sent to BOP Central Office (Washington DC) for review and approval prior to issuing discipline and closing out the case*<sup>91</sup>

During the time of the events described in this article, Lieutenant Stephen Putnam was the head of SIS at FCI Dublin.<sup>92</sup> In the sections below we carefully analyze Lieutenant Putnam’s actions or inactions through the lens of enabling. The motivations for Lieutenant Putnam’s enabling of Warden Garcia’s criminal actions and other perpetrators, is unclear.<sup>93</sup> It is clear, however, that Lieutenant Putnam’s actions meet the test for enabling as defined in this Article.<sup>94</sup>

Maegan Malespini, the National PREA Coordinator testified at Warden Garcia’s trial. According to Ms. Malespini SIS should be made aware of every report regarding sexual assault and must conduct an initial interview thereafter. Excerpts of Ms. Malespini’s testimony are below.

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<sup>89</sup> Interview with anonymous former Lieutenant at FCI Dublin. Though we were unable to access the unredacted version of the handbook, we spoke with a former FCI Dublin guard who previously worked in the SIS department at another prison before joining FCI Dublin (notes on file with author’s).

<sup>90</sup> *Id.*

<sup>91</sup> Anonymous former warden (correspondence on file with authors).

<sup>92</sup> According to a recent article Lieutenant Putnam is on administrative leave. See Lisa Fernandez, *Scandal-Plagued FCI Dublin to Receive Semi-Surprise Visit from Judge*, KTVU FOX 2 (2024), <https://www.ktvu.com/news/scandal-plagued-fci-dublin-to-receive-semi-surprise-visit-from-judge> (last visited Feb 5, 2024).

<sup>93</sup> We discuss motivations in section VIII B.

<sup>94</sup> See Section I for definition of enabling.

Q: Once a report is made – once a report of sexual abuse is made, how would a prison go about investigating that?

A: Yeah, so every allegation of sexual abuse goes through the same process at the beginning. And so, the operations lieutenant, who is like the supervisor on shift for day-to-day things that happen within the prison, would be the person that organizes that initial response to the allegation.

And every single allegation is met with at least three things that happen immediately, the first being an interview they can happen in any order, but there's three things that have to happen: They do an interview with our SIS staff, which is special investigative services; they are seen for a psychological evaluation, and they're seen for a medical assessment after any allegation.<sup>95</sup>

After completion of these three steps, a report is submitted to an Associate Warden, who serves as the PREA Compliance Manager tasked with determining if any further investigation will be conducted.<sup>96</sup> According to Ms. Malespini's testimony the Prison Warden is the only official within the facility who has the power to refer a report for further investigation either to OIG or OIA.<sup>97</sup> Whichever agency received the report would then make the decision whether to share the allegation with the US Attorney.<sup>98</sup>

According to BOP's Sexually Abusive Behavior Prevention and Intervention Program, "when the agency conducts its own investigations into allegations of sexual abuse and sexual harassment, it shall do so promptly, thoroughly, and objectively for all allegations, including third party and anonymous reports."<sup>99</sup>

## **B. Inmates Reporting Sexual Abuse**

There are various avenues by which inmates can formally report sexual assault, abuse, and harassment allegations against staff members. According to the Federal Correctional Institution Dublin Inmate Admission & Orientation Handbook, an inmate may:

- Email OIG;
- Tell any staff member about the sexual abuse or harassment;
- Write a "Cop-out" to any staff member you are comfortable with;
- Write directly to the Regional or Central Office PREA Coordinator;
- Write directly to OIG;

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<sup>95</sup> Garcia Crim. Trial Tr, *supra* note 24 at vol.4 672:23-673:11.

<sup>96</sup> Garcia Crim. Trial Tr, *supra* note 24 at Vol.4 675.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> 28 C.F.R. §115.71(a); See also PROGRAM STATEMENT 5324.12, *supra* note 30 at 43.

- File an administrative remedy;
- Have someone you trust report the allegations online;<sup>100</sup>

However, some inmates may not know how to report, or may not trust the system when reporting abuse.<sup>101</sup> While there is an expectation of anonymity, many inmates fear their complaints will not be anonymous and they will be retaliated against for reporting.<sup>102</sup>

One of Warden Garcia's victims testified at his trial regarding the reporting mechanism's at FCI Dublin:

*There's multiple ways you can report PREA. You can send an email to staff, which goes to SIS, which is in the lieutenant's office. That wouldn't help me here because [Garcia is] above them. You could do an outside reporting, but in order for me to outside report it, I would have to speak to someone over the phone or the computer. So that option is out as well, because all of those are monitored in and out<sup>103</sup>*

According to the 2022 FCI Dublin PREA audit “the SIS Lieutenant confirmed that the OIG will immediately forward reports to the facility.”<sup>104</sup> This puts the lie to any pretense of anonymity protecting the victim from the abuser and the abusers' enablers.

As we have learned, SIS officials at FCI Dublin responded to claims of abuse with indifference, if at all. SIS's manner of investigation reflects enabling behavior.

## V. Identifying an Enabler at FCI Dublin

Inmates at FCI Dublin encountered two types of enablers: those who facilitated abuse to protect the institutional integrity of the prison - and by extension their employment and status - and those who helped the predators directly, either as friends, colleagues or subordinates concerned about their jobs. At FCI Dublin, the Warden, Chaplin, and Guards, had nary a concern of being denied access to

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<sup>100</sup>Inmate Handbook, *Supra* note 75, at 50-54.

<sup>101</sup> See Sheryl Pimlott Kubiak et al., *Reporting Sexual Victimization During Incarceration: Using Ecological Theory as a Framework to Inform and Guide Future Research*, 19 TRAUMA, VIOLENCE, & ABUSE 94 (2018).

<sup>102</sup>See Saliba, *supra* note 11 (“Perhaps the most damaging effect of the power afforded male guards is that it inhibits the prisoner's ability to speak out against the abuse for fear of retaliation.”); See also Elana M. Stern, *Assessing Accountability: Exploring Criminal Prosecution of Male Guards For Sexually Assaulting Female Inmates in U.S. Prisons*, 167 U. PA. L. REV 733 (2019) (discussing how “women cannot trust their reports will remain confidential” and fear of retaliation in prison).

<sup>103</sup> Garcia Crim. Trial Tr., *Supra* note 24 at vol 5. 762:5-12.

<sup>104</sup> Dublin PREA Audit, *supra* note 44 at 68.

inmates for their sexual pleasure, thanks to their enablers, who either kept silent, or refused to acknowledge the horrors taking place.

### A. Lieutenant Stephen Putnam

Victims of sexual abuse often say that while the harm caused by the perpetrator was painful, the realization that those in a position to protect them failed in their duty to do so was even more painful.<sup>105</sup> As articulated by Katrina, one of Warden Garcia's victims, "that [the abuse] gets swept under the rug for months or years is heartbreaking to the abused. As a ward of the government, it was their job to protect me, and they failed me."<sup>106</sup>

The testimony of SIS Lieutenant Stephen Putnam offers insight into the failed response to reports of sexual misconduct between prison staff and inmates. Lieutenant Putnam was deposed in *United States of America vs. Ray J. Garcia* on December 6, 2022, to explain his role in the investigatory process.<sup>107</sup>

In the excerpt below from the trial transcript, the individual asking the questions is James Reilly, defense attorney for Warden Garcia, and Lieutenant Putnam is answering.

Q. You had a lot going on at that time, didn't you?

A. I always do.

Q. About 100 cases that were backlogged, way out of date, something of them?

A. Yes, sir. Yes, sir.

Q. As far back as 2016 hadn't been resolved yet?

A. Yes, sir.

Q. You hadn't written your reports?

A. That is correct.<sup>108</sup>

According to BOP guidelines, investigations conducted at each institution should be resolved within 120 days.<sup>109</sup> Lieutenant Putnam's testimony makes clear that was not the case. Equally egregious, Lieutenant Putnam failed to write reports as required.

Katrina said the following when questioned by Assistant United States Attorney Andrew Paulson about her experience reporting abuse:

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<sup>105</sup> See generally Guiora, *supra* note 13.

<sup>106</sup> Garcia Trial Tr., sentencing at 30:25-31:3.

<sup>107</sup> Garcia Crim. Trial Tr., *supra* note 24 at vol. 8.

<sup>108</sup> Garcia Crim. Trial Tr., *supra* note 24 at vol. 8 1279:5-13.

<sup>109</sup> PSI REPORT, *supra* note 8, at 24.

Q. And then you indicated that you ultimately made a report about Mr. Garcia to the staff psychologist?

A. Yes, I did.

Q. Do you remember who that was?

A. Dr. Hung. He's our C-side unit psychologist.

Q. And when you did that, did -- was it your understanding that he was obligated to report that --

A. Yes.

Q. -- to other authorities at the facility?

A. Correct.

Q. And to your understanding, he did that; correct?

A. From my understanding, yes. From our discussion just this last week, he said he filed the paperwork for that, which I assume is why I saw medical the next day for the PREA assessment. However, he has never heard anything coming back on it,

but I also had my friend report this incident and many other forms as well.<sup>110</sup>

...

Q. And then you -- you also indicated that on August the 4th of 2021, that someone spoke to a captain about this?

A. I spoke to the captain.

Q. That was you that did that?

A. Uh-huh. And then eight months later, I did it again to a different captain that was there, because nothing had happened and I still didn't feel safe for myself from staff or inmates.<sup>111</sup>

Despite the multiple reports Katrina submitted about her abuse, Lieutenant Putnam failed to properly investigate those complaints. As a result, no action was taken on her behalf either at the time she complained or in the months following. It was only when the FBI became involved, in response to another inmates' complaints, that Katrina's allegations were addressed.<sup>112</sup>

The following three passages were shared with us by a former FCI Dublin Unit Manager regarding guards who abused inmates—sexually, physically, mentally, and emotionally—without any repercussions.<sup>113</sup> SIS Lieutenant Putnam was mandated with investigating these complaints, yet failed to do so.<sup>114</sup>

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<sup>110</sup> Garcia Crim. Trial Tr., *supra* note 24 at vol. 5 790:13-791:5.

<sup>111</sup> Garcia Crim. Trial Tr., *supra* note 24 at vol. 5 791:17-24.

<sup>112</sup> See *infra* appendix B.

<sup>113</sup> Korth, *supra* note 74.

<sup>114</sup> See Report I-2006-009, *supra* note 86.

1. *I had inmates come to me on a daily basis in tears about five specific correctional officers. I would report them to SIS multiple times. I reported them to the Captain, their supervisor, multiple times. As a result, two of those officers were given Officer of the Year twice (alternating years) and Officer of the Quarter many times, and one was made the Training Officer for the incoming staff<sup>115</sup>*
2. *There was the chaplain. My office was in the same area as his. I reported his behavior just a few weeks into him working in Dublin. My coworker and I talked to him first about inappropriate things and what the inmates may do to compromise him, but he was arrogant and did not want to listen. We first told his boss a few times before any abuse occurred that she needed to talk to him. She didn't. As his behavior started showing all the red flags, I notified SIS and his boss. Then inmates started to tell me things he was doing. I reported it to SIS and his boss. Not until an inmate went out to the hospital for a rape kit did they do anything about him. It wasn't even any of the inmates I reported about!<sup>116</sup>*
3. *Most of the victims were from my unit. I got so tired of reporting things and not having anything done I told the inmates in my unit to start having their families contact outside agencies, media, local members of Congress, or whoever it took because nobody here would do anything<sup>117</sup>*

In a class action civil lawsuit filed on August 16, 2023, against the BOP and individually named defendants, Lieutenant Putnam is named in nine of the twenty-two claims for relief.<sup>118</sup> One of the claims alleges that after an inmate reported an officer's ongoing sexual misconduct in November of 2022, Lieutenant Putnam said "it was 'too much' for him to deal with and did not follow up with the alleged victim."<sup>119</sup> Another claim alleges victims reported sexual abuse to SIS staff, sometimes up to four times, only to have their reports ignored.<sup>120</sup>

According to the BOP's response to the civil lawsuit, Lieutenant Putnam was promoted within the SIS division at FCI Dublin as part of a "complete overhaul of

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<sup>115</sup> Korth, *supra* note 74.

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> California Coalition For Women, et.al v. USA FBOP, Pl.[\*s] Compl., Case no. 4:23-cv-04155 at claims 4-8, 12, 14, 18, and 20 [hereinafter Pl.[\*s] Compl.].

<sup>119</sup> *Id.* at 43:10-13.

<sup>120</sup> *Id.* at 43:1-3, 26-28.

the entire [Dublin] managerial staff”.<sup>121</sup> Yet, as of January 5, 2024, there have been continued reports of sexual misconduct occurring at FCI Dublin.<sup>122</sup>

U.S. District Court Judge Yvonne Gonzalez Rogers, who presided over the *Garcia* trial, said in a separate hearing that “Lt. Putnam never acted, he did nothing. It’s hard for me to trust Putnam when he did so little.”<sup>123</sup>

## VI. The Scope of Sexual Abuse in U.S. Prisons

Beyond the widespread and systemic abuse at FCI Dublin, female inmates incarcerated in the United States were sexually abused by male BOP employees at approximately 65.5% of facilities that housed women between 2012 and 2022 (19 of 29), with recurrent sexual abuse of female inmates in at least four facilities: MCC New York,<sup>124</sup> MDC Brooklyn,<sup>125</sup> FCC Coleman,<sup>126</sup> and FCI Dublin. In many of these cases, abuse continued for years despite consistent reporting.<sup>127</sup>

Sexual abuse across the prison system creates large costs borne by taxpayers. The most complete assessment available at this time regarding the prevalence and cost of sexual abuse in correctional facilities is the Prison Rape Elimination Regulatory Impact Assessment (“PREA RIA”),<sup>128</sup> published in 2012 by the Department of

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<sup>121</sup> BRIEF ISO OPPOSITION TO MOTION FOR PRELIM. INJUNCTION - CASE NO. 4:23-CV-04155-YGR at 5:3 of section memo of points and authorities, 5:3 of Declaration of Morgan Agostini.

<sup>122</sup> See Pl.[’s] Compl, *supra* note 118. See also Lisa Fernandez, *FCI Dublin Prison Officers Are Angry with New Administration and “we Are Paying for It,” Woman Testifies*, KTVU FOX 2 (2024), <https://www.ktvu.com/news/fci-dublin-prison-officers-are-angry-with-new-changes-and-we-are-paying-for-it-woman-testifies> (last visited Jan 12, 2024).; see also *Inmates testify about sexual abuse at FCI Dublin women’s prison - CBS San Francisco*, (2024), <https://www.cbsnews.com/sanfrancisco/news/fci-dublin-sexual-abuse-scandal-inmates-testify-womens-prison/> (last visited Jan 12, 2024).

<sup>123</sup> Lisa Fernandez, *Facing More than 45 Sex Abuse Suits, Judge Could Appoint Special Master over FCI Dublin Prison*, KTVU FOX 2 (2023), <https://www.ktvu.com/news/facing-more-than-40-sex-abuse-suits-judge-could-appoint-special-master-over-fci-dublin-prison> (last visited Jan 3, 2024).

<sup>124</sup> PSI REPORT, *supra* note 8 at 10 (at MCC New York, an officer sexually abused at least seven women between 2012 and 2018. In a 2020 civil suit, three of the victims alleged staff at MCC New York “ignored warning signs [and] inmate’s sex abuse allegations.” It is alleged that supervisor said to inmates: “I don’t want to hear nothing about my officers touching you.”).

<sup>125</sup> PSI REPORT, *supra* note 8 at 11 (at MDC Brooklyn, two lieutenants and one officer were indicted by the DOJ for repeated sexual abuse of nine female prisoners).

<sup>126</sup> PSI REPORT, *supra* note 8 at 11-12 (at FCC Coleman, fifteen women who accused eight BOP employees of sexual misconduct were paid a \$1.25 million settlement. Even though six of the men admitted to sexual abuse, no one was ever prosecuted).

<sup>127</sup> See generally, PSI REPORT, *supra* note 8.

<sup>128</sup> UNITED STATES DEP’T OF JUSTICE, *Prison Rape Elimination Act Regulatory Impact Assessment*, (2012),



Justice as part of PREA's original mandate.<sup>129</sup> Conclusions in the PREA RIA are based on the 2008 National Inmate Survey ("NIS"),<sup>130</sup> collected by the Bureau of Justice Statistics. The PREA RIA estimates more than 1,000,000 inmates were sexually abused between 1992 and 2012, with nearly 1 out of 20 prisoners (4.4%) reporting abuse every year.<sup>131</sup> Inmates are victims of rape and sexual assault at a rate over twenty-five times higher than the general public.<sup>132</sup> Much of the abuse reported in the NIS was perpetrated by prison staff.<sup>133</sup>

System-wide abuse creates significant costs in addition to the \$80.2 billion required to operate public prisons and jails.<sup>134</sup> PREA RIA estimated the monetary cost of prison rape across all prisons, jails and juvenile detention facilities as "at least \$52 billion annually,"<sup>135</sup> or \$72.6 billion adjusted for current inflation.<sup>136</sup>

## VII. Quantifying Harm Caused by Enablers

We quantify the harm caused by prison rape using methods developed in the PREA RIA.<sup>137</sup> However, as shown below, the PREA RIA framework likely results in a conservative assessment.<sup>138</sup>

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<https://www.prearesourcecenter.org/sites/default/files/library/prearia.pdf> [hereinafter PREA RIA].

<sup>129</sup> 28 C.F.R. §115.

<sup>130</sup> The National Inmate Survey (NIS) [hereafter NIS] (2008, 2011-12, 2023) periodically collects anonymous data from a sample of inmates at participating institutions and provides the most complete picture of sexual abuse in American prisons (<https://bjs.ojp.gov/topics/corrections/prea>).

<sup>131</sup> PREA RIA, *supra* note 128. at 16.

<sup>132</sup> NIS *supra* note 130; U.S. Department of Justice Office of Justice Programs Bureau of Justice Statistics, *Criminal Victimization, 2022* <https://bjs.ojp.gov/document/cv22.pdf>

<sup>133</sup> NIS *supra* note 130.

<sup>134</sup> Prison Policy Initiative, *Economics of Incarceration*,

[https://www.prisonpolicy.org/research/economics\\_of\\_incarceration/](https://www.prisonpolicy.org/research/economics_of_incarceration/) (last visited Jan 24, 2024).

<sup>135</sup> PREA RIA, *supra* note 128 at 2.

<sup>136</sup> Adjusted for Inflation from January 2011 to December 2023 using U.S. Bureau of Labor Statistics, *CPI Inflation Calculator*, BLS.GOV (2024), [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm) (last visited Jan 24, 2024).

<sup>137</sup> The methods used in the PREA RIA are best suited to analyzing the cost abuse of men in prison who outnumber women. See PREA RIA, *supra* note 128; See also NIS, *supra* note 130.

<sup>138</sup> PREA RIA estimates are conservative for the entire prison population. Though the PREA RIA does use incidence of abuse (number of times each victim was abused) as a differentiator between NCSA-High and Low, incidence is completely ignored in cases of "Willing" Sex with Staff and Staff Sexual Misconduct Touching only. The PREA RIA also fails to take into account harm caused by multiple years of abuse in all categories. Further, by leaving the valuation of suffering and lost quality of life unchanged from the Miller study, the PREA RIA fails to take into account important differences in the prison setting that exacerbate harm including the fact that victims of staff sexual misconduct "cannot

Though our methodology is not novel, to our knowledge we are the first to contextualize harm incurred by victims as part of a widespread network of costs attributable to both perpetrators and enablers. Based on our calculations, we assert the cost of sexual abuse perpetrated and enabled by staff at female state and federal prisons costs *1 billion* dollars annually.<sup>139</sup> In 2022, female prisoners represented only “7% of the total combined state and federal prison population.”<sup>140</sup> Given the relatively low representation of women in the prison population, the expenditure of *1 billion* dollars carries considerable weight for society. Moreover, underreporting is prevalent within the prison system.<sup>141</sup> This hesitancy to report stems from fear of retaliation and the acknowledgment that reporting is often met with little or no consequential action.<sup>142</sup>

The methodology used in the PREA RIA calculations is outlined below.

#### A. Methods/Overview

The PREA RIA calculates total costs of abuse by adding multiple components of harm incurred by victims of rape based on a 2007 study of the costs of sexual violence in the general population by Professor Ted Miller.<sup>143</sup> Professor Miller’s study found the cost of rape of adult victims to be \$201,865 (in 2011 dollars) with a cost of \$392 for abusive sexual contact per victim.<sup>144</sup>

The study combined the costs of medical care, mental health care, lost work, property damage, suffering and lost quality of life, sexually transmitted diseases, pregnancy, suicide acts, substance abuse, victim services, and criminal justice, sanctioning and perpetrators earing lost.<sup>145</sup> The PREA RIA utilizes unchanged figures from the Miller study for most categories in its own analysis including suffering and lost quality of life which accounts for around 75% of costs.<sup>146</sup> However, several categories are modified or excluded in the PREA RIA model to account for differences between prisons and the general populations.<sup>147</sup> The

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escape from their perpetrators and may fear retaliation should they report their victimization”.

<sup>139</sup> See Table 1.

<sup>140</sup> Ann E. Carson & Rich Kluckdow, *Prisoners in 2022 – Statistical Tables*, STATISTICAL TABLES (2023), <https://bjs.ojp.gov/document/p22st.pdf>.

<sup>141</sup> See Stern, *supra* note 102 at 735; see also Daly, *supra* note 12.

<sup>142</sup> *Id.*

<sup>143</sup> Ted R. Miller et al., COSTS OF SEXUAL VIOLENCE IN MINNESOTA, at 11 62/ (Minn. Dep’t Health July 2007), available at [http://www.pire.org/documents/mn\\_brochure.pdf](http://www.pire.org/documents/mn_brochure.pdf).

<sup>144</sup> PREA RIA, *supra* note 128. at 43.

<sup>145</sup> *Id.* at 44 Table 4.1.; see also *Id.* at table 4.3 & 4.5 see *infra* appendix c.

<sup>146</sup> *Id.* at 54.

<sup>147</sup> *Id.*

modified RIA model estimates the cost of rape at \$160,000 per victim and the cost of abusive sexual contact at \$600 per victim.<sup>148</sup>

The PREA RIA sorts sexual abuse into six categories, four of which are applicable to staff-on-inmate abuse.<sup>149</sup> Those four categories include: Nonconsensual Sexual Acts High (NCSA-High), Nonconsensual Sexual Acts Low (NCSA-Low), “Willing” Sex with Staff<sup>150</sup>, and Staff Sexual Misconduct Touching only<sup>151</sup> (See table 2 and 3).<sup>152</sup> NCSA-High, which covers instances of sexual abuse where victims are either physically injured, have been subjected to force or the threat of force, or experienced a high incidence of assault, is valued at three times the modified cost of rape (\$480,000) to account for increased severity.<sup>153</sup> NCSA-Low and “Willing” Sex with Staff are both valued at \$160,000 per victim, and Staff Sexual Misconduct Touching only is valued at \$600 per victim.<sup>154</sup>

By leaving the valuation of suffering and lost quality of life unchanged from the Miller study, the PREA RIA fails to consider important differences in the prison setting that exacerbates harm including the fact that victims of staff sexual misconduct “cannot escape from their perpetrators and may fear retaliation should they report their victimization.”<sup>155</sup>

## B. Calculations

Despite the drawbacks inherent to the PREA RIA,<sup>156</sup> it remains the single most complete assessment of the costs of sexual abuse in American prisons and meets the goal of this article in providing a conservative estimate of costs. We estimate the total harm associated with staff abuse of female inmates using categories,

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<sup>148</sup>*Id.* at 57.

<sup>149</sup>*Id.* at 24 table 1.1.

<sup>150</sup> We categorically disagree with using the word “willing”, but it is included here because that is what the RIA model uses. The RIA defines willing as “sexual contacts with staff that go beyond sexual touching but that the inmate has characterizes as willing.” Regardless of the inmate’s characterization of their abuse due to the prison structure and law any sexual contact between inmates and correctional facility staff is never consensual. *See* PREA RIA, *supra* note 128 at 26.

<sup>151</sup> The RIA fails to adequately account for harm caused by Staff Sexual Misconduct Touching only by failing to distinguish between willing and unwilling touching in its cost analysis and minimizing possible harm in its assessment that “the majority of inmates who experience [abusive sexual contact] are likely to experience little or no measurable suffering or diminished quality of life.” *See* PREA RIA, *supra* note 128, 26 & 61.

<sup>152</sup> PREA RIA, *supra* note 128 at 24 Table 1.1; Table 1.1 *see infra* appendix c.

<sup>153</sup> *See* PREA RIA, *supra* note 128 at 4; *see also* NIS, *supra* note 130 at 23 (Women are far more likely to be pressured in staff on inmate abuse (81.9%), more likely to be abused with force or threat of force (38.8%), and more than twice as likely to be injured (19.2%).)

<sup>154</sup> PREA RIA, *supra* note 128 at 63 Table 5.1.

<sup>155</sup> *Id.* at 45.

<sup>156</sup> *Id.*

associated costs, and methodology directly from the PREA RIA,<sup>157</sup> with additional data from the 2008 National Inmate Survey (NIS).<sup>158</sup>

In 2008, the NIS reported 64,500 victims of sexual assault in prison, 41,200 were victims of staff sexual misconduct.<sup>159</sup> Of those, 6,965 were victims of “Staff Sexual Misconduct Touching only” (16.91%), and 12,628 were victims of “Willing”<sup>160</sup> Sex with Staff (30.65%).<sup>161</sup> The remaining 21,607 (52.44%) were victims of either Nonconsensual Sexual Acts (NCSA) of either high or low incidence/severity.<sup>162</sup> Using this method, NCSA High cases account for 39.03% of all cases of staff on inmate abuse and NCSA Low cases account for 13.41% of all cases of staff on inmate abuse.<sup>163</sup> These percentages are applied to the NIS estimate of 2,123 female victims of staff on inmate abuse in 2008 in table 1.<sup>164</sup>

Costs and number of victims are adjusted for inmates that were not accounted for in the NIS because of their release, by 137.7%, the same percentage used in the PREA RIA.<sup>165</sup> Costs are subsequently adjusted for inflation from January 2011 dollars to December 2023 dollars.<sup>166</sup> These adjustments yield an estimated cost of abuse greater than *1 billion* dollars annually for staff on inmate abuse of female inmates in state and federal prison. Women in federal prison in 2009 made up 11.56% of the female prison population.<sup>167</sup> Assuming that women in federal prison are abused at a rate comparable to those in state prison, sexual abuse of female inmates by staff in federal prison costs an estimated \$121,847,772 per year. (Table 1)

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<sup>157</sup> PREA RIA, *supra* note 128.

<sup>158</sup> NIS, *supra* note 130.

<sup>159</sup> Allen J. Beck et al., *Sexual Victimization in Prisons and Jails Reported by Inmates, 2008-09: (610242010-001)*, (2010), at 7 <http://doi.apa.org/get-pe-doi.cfm?doi=10.1037/e610242010-001> (last visited Feb 4, 2024).

<sup>160</sup> *Supra* note 150.

<sup>161</sup> PREA RIA, *supra* note 128 at 28 Table 1.3.

<sup>162</sup> J. Beck et al., *supra* note 159. (Because victims of both staff sexual abuse and inmate on inmate abuse can be categorized as NCSA High/Low, the exact distribution of NCSA High vs Low for staff sexual abuse is unclear. This distribution was estimated commensurate with the proportion of all NCSA cases NCSA High (74.43%) and NCSA Low (25.57%) account for all victims of prison sexual abuse).

<sup>163</sup> *Id.*

<sup>164</sup> NIS, *supra* note 130 at 23 Table 17.

<sup>165</sup> PREA RIA, *supra* note 128 at 28.

<sup>166</sup> Used U.S. Bureau of Labor Statistics, *supra* note 136.

<sup>167</sup> J. Beck et al., *supra* note 159 at 21. (There were 13,273 women in federal prison out of a total female prison population of 114,852).

Table 1<sup>168</sup>

Type of Abuse	Cost Multiplier	Percent of Total	Female Victims of Abuse	With Releases	Cost in 2011 dollars	Adjusted for Releases	Adjusted for inflation
NCSA-- High	\$480,000	39.03	829	1142	\$397,731,312	\$547,676,017	\$762,857,924
NCSA-- Low	\$160,000	13.41	285	392	\$45,551,088	\$62,723,848	\$87,368,048
"Willing" Sex With Staff	\$160,000	30.65	651	896	\$104,111,920	\$143,362,114	\$199,689,088
Touching Only	\$600	16.91	359	494	\$2,153,996	\$2,966,052	\$4,131,415
Total	-/-	-/-	2123	2923	\$549,548,316	\$756,728,031	\$1,054,046,475

### C. Additional costs

In addition to the suffering of victims of staff sexual abuse and assault, others within the prison environment experience harm. The prison environment alone can reactivate triggers caused by past trauma that creates an even greater risk of “substance use, PTSD, depression, and criminal behavior.”<sup>169</sup> All prisoners experience elevated rates of PTSD, with women experiencing the highest rate at nearly 30%.<sup>170</sup> According to the American Psychological Association, PTSD

<sup>168</sup> Data limitations in the NIS prevented the exact reproduction of the methods used in the PREA RIA in our cost analysis of the staff abuse of female inmates. The PREA RIA uses force, injury, and incidence to distinguish between NCSA High and Low cases. Separate injury and use of force data for female victims of staff sexual abuse is available in the NIS, but incidence data combines incidence rates of non-consensual abuse and "Willing" Sex with staff. Without separate incidence rates for non-consensual abuse and "Willing" Sex with Staff, reproducing the PREA RIA methodology exactly is impossible. Instead, we use the percentage breakdown of an NCSA case being "High" or "Low" directly from the PREA RIA.

<sup>169</sup> Emily Wildra, *No Escape: The Trauma of Witnessing Violence in Prison*, PRISON POLICY INITIATIVE (Dec. 2, 2020), <https://www.prisonpolicy.org/blog/2020/12/02/witnessing-prison-violence/> (last visited Feb 4, 2024).

<sup>170</sup> Ashley Goff et al., *Does PTSD Occur in Sentenced Prison Populations? A Systematic Literature Review*, 17 CRIM BEHAV MENT HEALTH 152 (2007).

occurs when a person is “threatened with death or serious bodily injury” and that person responds with “intense fear, helplessness and horror.”<sup>171</sup>

Witnessing violence including sexual abuse can compound this harm and create further “post-traumatic stress symptoms, like anxiety, depression, avoidance, hypersensitivity, hypervigilance, suicidality, flashbacks, and difficulty with emotional regulation”.<sup>172</sup>

Additionally, prisoners are at higher risk of suicide than the general population with victims of prison rape being even greater with “nearly 50% contemplat[ing]...and 17-19% actually attempt[ing].”<sup>173</sup> Suicide, successful or otherwise, “has been estimated to cost an average of \$227,000 in 2011 dollars.”<sup>174</sup> Witnessing suicide contributes to the further traumatization of inmates.<sup>175</sup>

Violence in prison, including witnessing sexual abuse and suicide, also affects prison guards.<sup>176</sup> 27% of corrections officers have PTSD at 6.75 times the national rate, 25% have depression at 3.57 times the national rate, and 17% have both PTSD and depression.<sup>177</sup> This means that an estimated 5,520 BOP corrections officers have PTSD, and 5,111 have depression.<sup>178</sup> PTSD has an excess economic burden of \$19,630 per year,<sup>179</sup> meaning that PTSD alone in BOP corrections officers could account for an estimated excess economic burden of \$108,357,600 per year.<sup>180</sup>

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<sup>171</sup> APA Dictionary of Psychology, <https://dictionary.apa.org/> (last visited Feb 8, 2024).

<sup>172</sup> Wildra, *supra* note 169.

<sup>173</sup> PREA RIA, *supra* note 128 at 48.

<sup>174</sup> NIS, *supra* note 130.

<sup>175</sup> Creating a Culture of Safety - Creating a Culture of Safety - Overview of the problem: Suicide and self-harm in correctional facilities | Vera Institute, <https://www.vera.org/publications/culture-of-safety-sentinel-event-suicide-self-harm-correctional-facilities/culture-of-safety/overview> (last visited Feb 7, 2024).

<sup>176</sup> *Id.*

<sup>177</sup> The prison experience for corrections staff, VERA INSTITUTE OF JUSTICE, <https://www.vera.org/reimagining-prison-web-report/examining-prisons-today/the-prison-experience-for-corrections-staff> (last visited Feb 4, 2024).

<sup>178</sup> Federal Prison System Budget Performance Summary Section II (<https://www.justice.gov/d9/2023-03/29-bop-bs-section-ii-chapter-omb-cleared-3.8.23-1045.pdf>) (last visited Feb 8, 2024).

<sup>179</sup> Lori L. Davis et al., *The Economic Burden of Posttraumatic Stress Disorder in the United States From a Societal Perspective*, 83 J CLIN PSYCHIATRY 40672 (2022).

<sup>180</sup> *Id.*; See also VERA, *supra* note 175; See also Budget, *supra* note 175. This number was calculated using BOP Correctional Officer (CO) staffing information from the department's 2024 budget request. The estimated cost of PTSD for BOP COs was calculated using the estimate of the prevalence of PTSD among COs and the estimate of the cost of PTSD above.

### VIII. Current and Proposed Legislation

In the preceding sections we shared with the reader different voices, expressing pain, distress, and anger. Based on these accounts at FCI Dublin, the Warden, Guards, and other staff had their pick as to whom they wished to assault, over, and over.<sup>181</sup>

#### A. Available Civil Remedies

Existing laws provide civil remedies to pursue both perpetrators and those we consider enablers in cases of staff-on-inmate sexual abuse. Claims of sexual abuse in prison are governed by 42 U.S. Code § 1983. Although it “does not confer substantive rights, it serves as a general remedy.”<sup>182</sup> Unfortunately, certain statutes create significant procedural obstacles for incarcerated women reporting sexual abuse by guards.<sup>183</sup> Professor Sharon Dolovich, a recognized Eighth Amendment scholar, wrote:

*[I]ncarcerated plaintiffs who wish to bring Eighth Amendment claims face substantial hurdles to getting into court and to prevailing on the merits once there—hurdles in many cases deliberately imposed by a Supreme Court that has systematically sought to limit judicial intervention on behalf of prisoners.<sup>184</sup>*

The initial challenge arises with the requirements set forth in the Prison Litigation Reform Act (“PLRA”) before filing a federal tort claim.<sup>185</sup> According to the PLRA, inmates must exhaust all administrative remedies as a mandatory step before initiating a claim.<sup>186</sup> Complicating matters, the PLRA mandates a demonstration of “physical injury” without providing a clear definition, leading to ambiguity in its application.<sup>187</sup>

Moreover, there is a divergence in court opinions regarding whether a claim for the violation of constitutional rights inherently encompasses mental or emotional

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<sup>181</sup> See generally Pl.[’s] Compl., *supra* note 118.

<sup>182</sup> Saliba, *supra* note 11 at 309.

<sup>183</sup> Stern, *supra* note 102 at 745 (“when incarcerated women do report sexual abuse by guards, they face extreme procedural hurdles”).

<sup>184</sup> Dolovich, *supra* note 66. at 164.

<sup>185</sup> Prison Litigation Reform Act of 1995, Pub. L. No. 104-134 (codified as amended in scattered titles and sections of the U.S.C.); see also H.R. 3019, 104th Cong. (1996).

<sup>186</sup> 42 U.S.C. §1997e(a).

<sup>187</sup> Sec 4 1346(b)(2) (“No person convicted of a felony who is incarcerated while awaiting sentencing or while serving a sentence may bring a civil action against the United States or an agency, officer, or employee of the Government, for mental or emotional injury suffered while in custody without a prior showing of physical injury”).

injury in the absence of a demonstrable physical injury.<sup>188</sup> This lack of clarity further complicates the legal landscape surrounding such claims.

In addition to these hurdles, the PLRA imposes another burden on inmates by necessitating “full” payment of court filing fees by all prisoners filing a claim.<sup>189</sup> This financial requirement adds to the challenges faced by incarcerated individuals seeking justice in cases of sexual abuse, exacerbating an already difficult situation.

While some female inmates have successfully brought civil actions in court, rarely are the suits successful.<sup>190</sup> As Elana M. Stern writes:

While criminal claims are by no means a substitute for civil claims—indeed, pursuing both forms of relief may be preferable—criminal liability holds at least two advantages over civil claims. First, criminal charges are not governed by the PLRA, and therefore are not limited by the PLRA’s exhaustion, filing fee, physical injury, or three-strikes provisions. Second, statutes of limitations for criminal sexual assault claims are generally longer; in some states, there is no statute of limitations for felony sexual assault<sup>191</sup>

### **B. Criminalizing The Enabler**

The proposal to criminalize the enabler is a broad, novel, and a necessary approach. It demands a fundamental change in criminal law that requires a rearticulation of how the duty to act is applied. The duty to act reflects the obligation to ensure the safety, wellbeing, and security of inmates.<sup>192</sup> This is not a moral obligation but rather a constitutional duty owed to inmates by the Eight Amendment which says in part that no “cruel and unusual punishments [be]

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<sup>188</sup> Know Your Rights | Prisoners’ Rights | ACLU, AMERICAN CIVIL LIBERTIES UNION, <https://www.aclu.org/know-your-rights/prisoners-rights> (last visited Feb 4, 2024) (citing to *Rowe v. Shake*, 196 F.3d 778 (7th Cir. 1999) (First Amendment claim not barred by physical injury requirement); *Canell v. Lightner*, 143 F.3d 1210 (9th Cir. 1998) (claim for violation of First Amendment is not a claim for mental or emotional injury); cases going the other way include: *Thompson v. Carter*, 284 F.3d 411 (2d Cir. 2002); *Searles v. Van Bebber*, 251 F.3d 869 (10th Cir. 2001); *Allah v. AlHafeez*, 226 F.3d 247 (3d Cir. 2000) (First Amendment claims involve mental or emotional injuries); *Davis v. District of Columbia*, 158 F.3d 1342 (D.C. 1998) (claim for violation of privacy is claim for mental or emotional injuries)).

<sup>189</sup> 28 U.S.C. § 1915(b).

<sup>190</sup> Dolovich, *supra* note 66 at 164 (discussing the hurdles inmates face in filing civil suits and how “court-ordered relief is elusive in all but the most egregious cases”); Cf. Brenda V. Smith, *Prosecuting Sexual Violence in Correctional Settings: Examining Prosecutors’ Perceptions*, 3 SSRN JOURNAL (2008), <http://www.ssrn.com/abstract=1129816> (last visited Feb 3, 2024) (discussing prosecutors’ perceptions of inmates claims).

<sup>191</sup> Stern, *supra* note 102 at 757.

<sup>192</sup> U.S. Const. amend. VIII.



inflicted”<sup>193</sup> The United States Supreme Court held in *Farmer v. Brennan* that the Eighth Amendment “imposes duties on [prison] officials, who must provide humane conditions of confinement” as well as ensuring “that inmates receive adequate food, clothing, shelter and medical care and must take reasonable measures to guarantee the safety of the inmates”.<sup>194</sup> The failure to protect vulnerable inmates, particularly in the face of continued abuse, is a violation of that guaranteed constitutional right.<sup>195</sup>

While there is no dispute that the behavior of the perpetrators rises to the level of criminality,<sup>196</sup> the role of the enablers is no less criminal in our view. Lieutenant Putnam’s lack of investigation and systemic indifference in response to inmates’ reports rises to the level of being a criminal enabler.

By criminalizing the enabler congress will take an essential step in its duty to protect vulnerable federal inmates.<sup>197</sup> The sexual abuse at FCI Dublin to which inmates were subjected and continue to be subject to,<sup>198</sup> makes clear that such actions are needed.<sup>199</sup>

In recommending that Congress criminalize the enabler we recognize that we are proposing the creation of an addition to the already existing criminal code.<sup>200</sup> That is a reflection of the fact that the actions of the enabler do not rise to the level of an accessory after the fact<sup>201</sup> or a co-conspirator.<sup>202</sup> Conspiracy and accomplice liability are criminal statutes that require the actor to take actions and to have the *mens rea* of purpose—a specific intent the target crime be committed.<sup>203</sup> An

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<sup>193</sup> *Id.*

<sup>194</sup> *Farmer v. Brennan*, 511 U.S. 825 (1994) (holding that deliberate indifference to the substantial risk of sexual assault violates prisoners’ rights under the Cruel and Unusual Punishments Clause of the Eighth Amendment); *See also Shorter v. United States*, 12 F.4th 366 (3d Cir. 2021); *see also Barney v. Pulispher*, 143 F.3d 1299, 1311 (10th Cir. 1998) (holding that policies alone do not establish obvious risks to female prisoners); *see also Know Your Rights | Prisoners’ Rights | ACLU*, *supra* note 191.

<sup>195</sup> *Id.*

<sup>196</sup> *E.g.* Daly et al., *supra* note 12 at 264. (discussing how “people do not have the legal capacity to consent to sex with people who otherwise control them”).

<sup>197</sup> *Id.*

<sup>198</sup> *See* Pl.[’s] Compl *supra* note 118.

<sup>199</sup> *See* Daly et al., *supra* note 12 at 270. (discussing how “the Senate report failed to accept any congressional responsibility”).

<sup>200</sup> 18 USCA.

<sup>201</sup> *Id.*

<sup>202</sup> *Id.* at § 371.

<sup>203</sup> Guiora, *supra* note 18 (citing Michael A. Foster, Cong. Rsch. Serv., R46836, *Mens Rea: An Overview of State-of-Mind Requirements for Federal Criminal Offenses* (2021), <https://crsreports.congress.gov/product/pdf/R/R46836/1> [<https://perma.cc/SSQ6-PK4V>]; *see also* Larry Alexander & Kimberly D. Kessler, *Mens Rea and Inchoate Crimes*, 87 J. CRIM. L. & CRIMINOLOGY 1138 (1997); Sheriff Girgis, Note, *The Mens Rea of Accomplice Liability: Supporting Intentions*, 123 YALE L.J. 266 (2013)).

enabler is not a co-conspirator or an accomplice in the traditional sense as they do not demonstrate the intent of a perpetrator.<sup>204</sup> To our knowledge, prison officials who enabled the perpetrators did not participate in their criminal actions nor were they present when the abuse occurred.

In making the case regarding the criminalizing of enablers on the federal level we must address the question of motivation. We offer the following non-exhaustive list of motivations to help understand the possible *mens rea* of the individual enablers:<sup>205</sup>

- Allegiance to the institution;<sup>206</sup>
- The financial realities of being employed by the institution;<sup>207</sup>
- The cost of whistleblowing, notwithstanding legal protections;<sup>208</sup>
- Dislike towards inmates/prisoner;<sup>209</sup>
- Disbelief of the complaint for any number of reasons;<sup>210</sup>
- Fear of retaliation of fellow BOP employees for doing something;<sup>211</sup>
- Concern regarding power of the organization, BOP;<sup>212</sup>
- Having fellow guards' back or "boys club" mentality.<sup>213</sup>

Based on our analysis of the actions of those who enabled the perpetrators at FCI Dublin, we suggest the following language that has been recommended in a previous article<sup>214</sup>, as a means of criminalizing the enabler in the correctional institution context: "(1) failing to alert the appropriate authorities of the known perpetrator's crimes, and/or (2) failing to remove or cause the removal of the known perpetrator from a likely position to commit a crime, and/or (3) placing the perpetrator in a likely position to commit a crime."<sup>215</sup>

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<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> Dolovich, *supra* note 66 at 168.

<sup>210</sup> Guiora, *supra* note 18.

<sup>211</sup> Saliba, *supra* note 11 at 299 ("Female guards who have complained about the abuse have themselves been subject to harassment.").

<sup>212</sup> Some of the former correctional workers we spoke with expressed this.

<sup>213</sup> Every former FCI Dublin Correctional Worker we spoke with described the environment as a "boys club"; Dolovich, *supra* note 66 at 163 (discussing that investigators admitted that their "loyalty to line staff virtually always leads them to side with the officers whatever the circumstances").

<sup>214</sup> Guiora, *supra* note 8.

<sup>215</sup> Additionally "A desire to protect oneself, one's friends, one's colleagues, or one's place of employment is not a defense to this crime nor does such a desire serve to mitigate punishment imposed at sentencing". Guiora et al., *supra* note 18. at 32-33.

To fully appreciate the need to criminalize enablers it is incumbent upon Members of Congress to ask two related questions: why did a pattern of criminal behavior at FCI Dublin continue unabated for such an extended period and why is it that previous BOP administrations and Congress were unable to aggressively address what can only be referred to as a systemic problem? Notwithstanding platitudes by BOP directors<sup>216</sup> and Senate hearings,<sup>217</sup> however well intentioned, the harsh reality is that inmate vulnerability continued unabated. While an obvious finger needs to be pointed at the perpetrators, their ability to act with immunity and impunity is a direct result of enablers such as Lieutenant Putnam and other guards.

As the court transcripts, particularly the testimony of Lieutenant Putnam,<sup>218</sup> make clear Putnam and the other investigators were well-positioned to prevent, at the very least, future abuse, but failed to do so. That failure, particularly regarding how investigations were conducted and the lethargy with which SIS handled complaints, is classic enabling behavior.

A report published by the Principal Associate Deputy Attorney General, recommends “eliminat[ing] the use of SIS in initial interviews or investigations.”<sup>219</sup> This recommendation is designed to eliminate the conflicts of interests between investigators because they “may be—or appear to victims to be—friends or colleagues of the alleged perpetrators” creates the appearance of a conflict of interest.<sup>220</sup> Eliminating SIS and instead having specially trained

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<sup>216</sup> We reached out to the BOP and received an email response from Carl Bailey, Office of Public Affairs (Sept 8, 2023) “While the Federal Bureau of Prisons (FBOP) does not comment on pending litigation or matters that are the subject of legal proceedings, I can provide the following. The FBOP has prioritized preventing and rooting out sexual misconduct perpetrated by FBOP employees and have placed the survivors of that sexual violence at the center of our work. While accountability for the perpetrators is critical, we also recognize that justice for survivors can go beyond prosecutions, and that we have a responsibility to provide services and support to the survivors who have endured trauma in FBOP custody. In that vein, the FBOP is actively reviewing compassionate release requests submitted by survivors of abuse perpetrated by FBOP personnel on a case-by-case basis and takes seriously the ongoing trauma that sexual assault victims suffer. All individuals in our custody have a right to be physically, mentally, and sexually safe. Reporting abuse takes a tremendous amount of courage and those who report such abuse have a right to be free from retaliation. Decency and humanity inside our nations' federal prisons is demanded from all, and those who fail to meet those standards will be held accountable to the fullest extent of the law.”

<sup>217</sup> See generally Oversight of the Federal Bureau of Prisons | United States Senate Committee on the Judiciary, *supra* note 43.; PSI REPORT *supra* note 8.

<sup>218</sup> See section V in this Article.

<sup>219</sup> Working Group of DOJ Components, *Report and Recommendations Concerning the Department of Justice's Response to Sexual Misconduct by Employees of the Federal Bureau of Prisons*, (2022), 15

[https://www.justice.gov/d9/pages/attachments/2022/11/03/2022.11.02\\_bop\\_sexual\\_misconduct\\_working\\_group\\_report.pdf](https://www.justice.gov/d9/pages/attachments/2022/11/03/2022.11.02_bop_sexual_misconduct_working_group_report.pdf).

<sup>220</sup> *Id.*

investigators would help alleviate some of the systemic enabling occurring in facilities across the BOP.<sup>221</sup>

Bipartisan legislation was introduced by Congresswomen Lucy McBath (D-GA) and Kelly Armstrong (R-ND) in the House of Representatives. Companion legislation was introduced in the Senate by Senators Ossoff (D-GA), Braun (R-IN), and Durbin (D-IL), entitled “Federal Prison Oversight Act”, which was introduced in April 2023 to establish, “new, independent oversight of the Bureau of Prisons (BOP).”<sup>222</sup>

While the legislation is meant to address the extraordinary harm we have discussed in this Article, buttressing it to include language that identifies enablers as criminals would increase its impact significantly.

According to Congresswoman McBath:

*Incarcerated Americans should not fear death when they enter our Federal prison system, and correctional officers should not fear for their safety in their workplace.... Our Federal prisons must serve as institutions that rehabilitate and prepare Americans for reentry into society, and that cannot happen without putting meaningful accountability measures in place. I am proud to sponsor this bipartisan legislation that will strengthen our Federal prison system, bolster public safety, and provide a mechanism for incarcerated individuals and their loved ones to protect their civil rights*<sup>223</sup>

According to Senator Durbin:

*In recent years, management of our federal prison system has been riddled with scandals and missteps. Since I've held the gavel of the Judiciary Committee, we've taken an active role in helping to restore integrity to the Federal Bureau of Prisons (BOP), including calling for a new BOP Director;*

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<sup>221</sup> *Id.*

<sup>222</sup> Sens. Ossoff, Braun, Durbin Introduce Bipartisan Legislation to Overhaul Federal Prison Oversight, U.S. SENATOR FOR GEORGIA JON OSSOFF, <https://www.ossoff.senate.gov/press-releases/sens-ossoff-braun-durbin-introduce-bipartisan-legislation-to-overhaul-federal-prison-oversight/> (last visited Jan 24, 2024); *see also* McBath, Ossoff, Colleagues Introduce Bipartisan Legislation to Overhaul Federal Prison Oversight, CONGRESSWOMAN LUCY MCBATH (2023), <https://mcbath.house.gov/2023/4/mcbath-ossoff-colleagues-introduce-bipartisan-legislation-to-overhaul-federal-prison-oversight/> (last visited Feb 4, 2024).

<sup>223</sup> *Id.*

*holding oversight hearings, and leading numerous responses to reports on solitary confinement, First Step Act<sup>224</sup> implementation, and misconduct by officials. Today's bill is the latest step in support of that mission to improve oversight and fulfill one of the fundamental purposes of the prison system: to provide safe and humane conditions of confinement and ensure the successful return of incarcerated individuals to the community<sup>225</sup>*

Congresswoman McBath and Senator Durbin are both correct; their words reflect the painful reality faced by unprotected, vulnerable federal inmates notwithstanding the duty owed them. Their proposed legislation is a step in the right direction, providing for some reckoning for a system that has failed the most vulnerable. Nevertheless, there is a requirement for further reforming existing statutes and guidelines.

### C. Proposals For Reform

To address the issues comprehensively, beyond the criminalization of enablers, we propose several modifications to existing statutes and investigative procedures. First, reforming, or reorganizing PREA is recommended to enhance accountability within the system. Second, there is a need for an adjustment in the “exhaustion” requirement stipulated by the PLRA. Third, it is imperative to address the significant understaffing and backlog of case investigations in the OIA and OIG offices. The overwhelming backlog of thousands of cases hampers the effectiveness of investigations.

#### *i. PREA*

We recommend reforming or reorganizing PREA.<sup>226</sup> It is crucial that any PREA reform involve a comprehensive reorganization aimed at ensuring accountability for federal facilities failing to meet PREA standards. The existing PREA audits are inadequate and lacking mechanisms to enforce the standards.<sup>227</sup> Instead, the responsibility for compliance lies solely with the individual institutions, as highlighted in Section II of this article. The 2022 FCI Dublin PREA audit reported

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<sup>224</sup> S.756 - 115th Congress (2017-2018): First Step Act of 2018, S.756, 115th Cong. (2018), <https://www.congress.gov/bill/115th-congress/senate-bill/756>.

<sup>225</sup> *Id.*

<sup>226</sup> See Giovanna Shay, *PREAs Peril*, 7 N.E. U. L. J. 21 (2015) (discussing the downfalls in PREA).

<sup>227</sup> *Id.*

full compliance with all PREA standards,<sup>228</sup> despite ongoing sexual abuse within the facility.<sup>229</sup>

The flaw in the system is evident, with PREA relying on “prisons officials’ self-reporting of PREA data and facilities’ participation in audits,” effectively concealing instances of noncompliance.<sup>230</sup> As articulated by Erin Daly, a Professor of Law at Widener University Delaware Law School, “this barely-a-slap-on-the-wrist approach may embolden perpetrators when they sexually violate and abuse the most vulnerable of women.”<sup>231</sup> Moreover, according to a 2022 Senate report the BOP fails to systemically analyze the PREA complaint data it has, and its reporting of that data is “confusing, omits relevant information and obscures BOP’s internal affairs case backlog.”<sup>232</sup> Additionally, PREA does not create a new cause of action, meaning that “claims of prisoner abuse that cite PREA as a separate cause of action end with dismissal.”<sup>233</sup>

*ii. PLRA*

Congress needs to reform statutes that make reporting more difficult and shield correctional authorities from liability such as the PLRA, which was discussed at length above. One recommendation is to change the “exhaustion” rule. The exhaustion rule is cumbersome and “bars the courthouse door to prisoners.”<sup>234</sup> This is an important statute to reform “because if the grievance procedures are meaningless or unnecessarily cumbersome or strict, an exhaustion rule simply undermines access to justice.”<sup>235</sup> Further allowing perpetrators and enablers to continue committing their crimes.

Further, the sovereign immunity claimed by prisons creates barriers “that bar lawsuits directly against state or federal correctional authorities. There are also judicially created barriers that limit lawsuits against local correctional authorities

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<sup>228</sup> Dublin PREA Audit *supra* note 44.

<sup>229</sup> PSI REPORT *supra* note 8; *see also* Pl.[’s] Compl *supra* note 118.

<sup>230</sup> Daly et al., *supra* note 12 at 289.

<sup>231</sup> *Id.* at 297.

<sup>232</sup> PSI REPORT *supra* note 8, at 23.

<sup>233</sup> Smith, *supra* note 26 at 1616 (citing *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (asserting that Congress must create a private right of action either explicitly or implicitly and the court cannot create a private right of action without that intent); *Collen v Yamaoka*, No. 14-00577 SOM/KSC, 2015 U.S. Dist. LEXIS 22322, at \*5 (D. Haw. Feb. 24, 2015) (“Absent specific congressional intent, no private right of action exists.”)).

<sup>234</sup> John J. Gibbons & Nicholas deB. Katzenbach, *Confronting Confinement - A Report of the Commission on Safety and Abuse in America’s Prisons Prison Reform: Commission on Safety and Abuse in America’s Prisons: Commission Report*, 22 WASH. U. J.L. & POL’Y 385, 503 (2006).

<sup>235</sup> *Id.* at 506.

and against individual state and local corrections officers.”<sup>236</sup> These statutes make it more difficult for victims to collect reasonable damages if they can file suit in the first place and contribute to corrections officers going unpunished when they “break the rules with impunity.”<sup>237</sup>

*iii. Investigations*

In response to a question about the employee discipline process within the BOP, then BOP Director Michael Carvajal called it “horrible”.<sup>238</sup> Director Carvajal further emphasized that “it takes too long to get anything done.”<sup>239</sup> These comments underscore the systemic issues of delays within the investigative system. As of November 2022, BOP OIA faced a backlog of “approximately 8,000 cases”, some dating back five years.<sup>240</sup>

Despite BOP policy mandating that local institutional investigations be resolved within 120 days,<sup>241</sup> by September 2022, 86 percent of investigations at local facilities remained open beyond the specified time limit.<sup>242</sup> Additionally, as of June 24, 2023, the BOP OIA had only closed 15.4 percent of misconduct allegations received in 2022.<sup>243</sup> This is particularly concerning for cases of staff sexual misconduct as 67.9 percent of female victims report multiple victimizations while incarcerated.<sup>244</sup> Prolonged investigations allow abusive staff to retain their positions without facing consequences, perpetuating a cycle of abuse and enabling Addressing the issue of delayed investigations and open cases are unlikely to be remedied quickly as the BOP estimates it will take at least two years.<sup>245</sup>

Notably 93.9% of allegations of staff misconduct received by BOP OIA are referred to Special Investigative Agents (“SIAs”) or SIS within local facilities.<sup>246</sup> However, as of July 2022, there were only “60 SIAs nationwide” tasked with resolving “7,893 open employee misconduct cases” across 121 institutions.<sup>247</sup>

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<sup>236</sup> Michael Singer, *Prison Rape an American Institution?* (Santa Barbara: Praeger, 2013), 12.

<sup>237</sup> PSI REPORT *supra* note 8, at 26.

<sup>238</sup> DOJ, *supra* note 85 at 15.

<sup>239</sup> *Id.*

<sup>240</sup> PSI REPORT *supra* note 8 at 3.

<sup>241</sup> DOJ, *supra* note 85 at 17.

<sup>242</sup> *Id.*

<sup>243</sup> OFFICE OF INTERNAL AFFAIRS REPORT FOR FISCAL YEAR 2022, 55, [https://www.bop.gov/foia/docs/2022\\_annual\\_oia\\_report.pdf](https://www.bop.gov/foia/docs/2022_annual_oia_report.pdf).

<sup>244</sup> PREA RIA, *supra* note 128 at 47.

<sup>245</sup> Oversight of the Federal Bureau of Prisons | United States Senate Committee on the Judiciary. September 2023 hearing.

<sup>246</sup> OFFICE OF INTERNAL AFFAIRS REPORT FOR FISCAL YEAR 2022, *supra* note 238 at 11 (93.9 percent of cases closed in 2022 were investigated by SIAs, 4.5 percent of cases closed in 2022 were investigated by OIA, 1.4 percent of cases closed in 2022 were investigated by OIG).

<sup>247</sup> DOJ, *supra* note 85 at 15 & 18.

While BOP OIA investigates some complex misconduct allegations (4.5%), the most serious cases are handled by OIG. Despite OIG having the primary responsibility for criminal allegations of misconduct by BOP employees, they can only pursue a fraction of such cases, as evidenced by closing only 24 cases (1.4%) in 2022.<sup>248</sup>

Even when investigations occur, substantiation is rare, and subsequent punishment is even less likely.<sup>249</sup> In 2022 only 422 out of 1,702 allegations of misconduct (26.0%)<sup>250</sup> were substantiated, with 408 involving BOP employees.<sup>251</sup> Substantiated cases resulted in no action, a written reprimand, or a suspension 63.2% of the time.<sup>252</sup> Substantiation rates were lower for allegations of sexual abuse, with only six cases sustained out of 459 allegations in 2022 (1.31%)<sup>253</sup>, while numerous allegations were still pending investigation.

The systemic issues within the BOP investigative processes, as highlighted by former Director Carvajal and the concerning statistics presented, underscore the need for comprehensive reforms.<sup>254</sup>

## IX. Conclusion

We close as we began with the words of a former inmate and a compelling call to criminalize enablers and further reform civil tort actions currently available:

*Something that will never leave me is that ominous sound of keys. Imagine the sound of a small chain that hangs from a belt with many, many keys and it just rattles constantly, bouncing against the leg of the person who walks around a place that echoes. We all held our breath no matter if we were in our cells, out in the dayroom, in the showers, or at our assigned workstations when we heard that sound. The anticipation that the officer wearing the keys was coming for us would become relief when the sound passed by us. And the times that the sound would stop in front of us, could trigger an anxiety attack whether we had done something wrong or not. You see, that was the thing. It didn't matter if we hadn't*

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<sup>248</sup> PSI REPORT *supra* note 8, at 27.

<sup>249</sup> See generally OFFICE OF INTERNAL AFFAIRS REPORT FOR FISCAL YEAR 2022, *supra* note 243.

<sup>250</sup> *Id.* at 11.

<sup>251</sup> *Id.*

<sup>252</sup> *Id.* at 14.

<sup>253</sup> *Id.* at 32

<sup>254</sup> See Daly, *supra* note 12 at 270.



*done anything wrong. These oppressors didn't care. They reveled in our terror. They let it feed them*<sup>255</sup>

When the former inmate initially spoke with us, the conversation was in the context of an unrelated research project. However, it quickly became apparent, in large part because of the extraordinary reporting of Lisa Fernandez<sup>256</sup> that the role of the enablers was essential to what can only be defined as institutionalized sexual abuse at a federal prison. For these reasons, it is crucial for Congress to enact legislation that criminalizes enablers. The enablers constitute an integral part of the system, and their actions facilitate the unimpeded abuse by perpetrators. Without addressing the roles of the enablers, the cycle of abuse continues within the system.

The former inmate's last two sentences are the most powerful and appropriate message to Congress and with them we conclude as they speak for themselves:

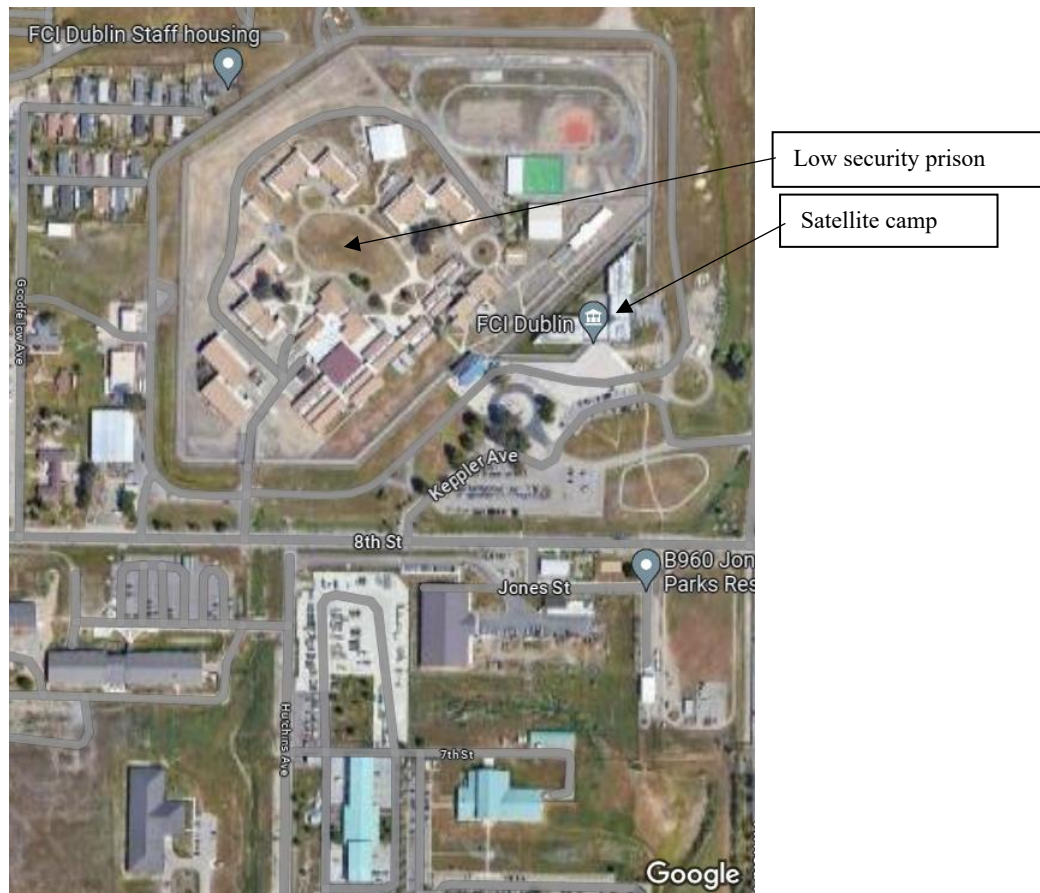
*These oppressors didn't care. They reveled in our terror. They let it feed them*<sup>257</sup>

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<sup>255</sup> Michelle J., *supra* note 2.

<sup>256</sup> For up to date information on the events at FCI Dublin see Lisa Fernandez, [Dublin prison, KTVU FOX 2 \(2024\)](https://www.ktvu.com/tag/series/2-investigates/dublin-prison), <https://www.ktvu.com/tag/series/2-investigates/dublin-prison> (last visited Jan 27, 2024).

<sup>257</sup> Michelle J., *supra* note 2.

**APPENDIX A: ARIEL VIEW OF FCI DUBLIN<sup>258</sup>****APPENDIX B: FULL STATEMENT OF MICHELLE J.**

Hope is the most valuable commodity inside of a prison. Once hope is taken from you, you don't end up doing your time; your time ends up doing you. Fear, on the other hand, is the kryptonite of hope, and every woman who lives in that space is filled with fear. We all were facing an internal battle between hope and fear and the men and women who were charged with being our captors exploited that fear to control us. Were there nice, kind officers inside? Absolutely there were, but they were few and far between. Every inmate knew that an officer could change their life forever. Regardless of our crime, background, or other differences, we inmates knew that it was us versus them. Did we have any power? The short answer is no. It didn't matter whether that power was used to simply herd us around the prison, or whether it was meant to be used in mentally

<sup>258</sup> Obtained from google maps satellite view.

challenging ways, we were like zombies walking around that hellhole, just waiting to be the next target.

One of the ways officers used to capitalize on our fears was that they read our pre-sentencing reports. These reports were compiled before entering prison. People in our lives were interviewed to paint a picture of us, and some of the information included was meant to paint a picture of who we were and why we did what we did to get there. Confidential and personal information that was not meant for outside eyes was being used by officers against inmates. There is nothing more bone-chilling than having an officer come up behind you and whisper in your ear the names that they should not have known from your past that you have tried like hell to forget. Some used that information to threaten loved ones on the outside. Others used it to blackmail inmates. It was mental warfare, and they held all the weaponry. They preyed upon the weak and punished the strong. No one was immune.

Something that will never leave me is that ominous sound of keys. Imagine the sound of a small chain that hangs from a belt with many keys and it just rattles constantly, bouncing against the leg of the person who walks around a place that echoes. We all held our breath no matter if we were in our cells, out in the dayroom, in the showers, or at our assigned workstations when we heard that sound. The anticipation that the officer wearing the keys was coming for us would become relief when the sound passed by us. And the times that the sound would stop in front of us, could trigger an anxiety attack whether we had done something wrong or not. You see, that was the thing. It didn't matter if we hadn't done anything wrong. These oppressors didn't care. They reveled in our terror. They let it feed them. Some got off on it, which then made them even more dangerous, with many of them acting out once they got that rush.

Here's a fun fact. As these officers are considered government officials, they are protected via qualified immunity. This means if it is alleged that one of these officials violated the rights of an individual, a suit is only allowed if it violated a clearly established statutory or constitutional right, even if it was malicious in nature. It was the ultimate game of chicken. Did an inmate dare go after an officer for wrongdoing if the chips were so clearly stacked against them in the officer's favor? And if they did, did they have the resources to bring it to fruition? Officers knew that the chances of that were slim to none, and they taunted us with that very fact. A very common taunt was, "Who are they going to believe? Me or a fucking scumbag felon like you?" They got away with so much under this stupid umbrella. I promise you that much of the contraband that was found in the prison during shakedowns was not brought in by prisoners. These assholes made a hell of a lot of money bringing in drugs, alcohol, cigarettes, phones, nail polish, lotion, and clothing, and not only could they toss a cell and implicate any inmate they knew they sold these items to, but they could also plant it in the cell of an unsuspecting inmate. So aside from the sheer dickishness of doing that just to stick to an inmate they didn't like, they couldn't get in trouble even if it was discovered

that they did so. Qualified immunity gave them a cloak of invincibility and actively encouraged them to act with impunity.

Two of the most awful officers we had to deal with subjected a female inmate to cruel taunting and public menstrual shaming. They forced her to work in her bloody clothing and announced that she was doing so over the prison public announcement system. They told anyone who would listen that they were immune from any punishment, which then of course led the inmates to believe they had no recourse. Things like this happened so often that to survive, we had to learn to become immune to it.

I was not one of the women who was subjected to sexual assault inside the prison, but I was one who had survived it not only once as a teenager, but a second time decades later. I'm not talking about the everyday misogynistic sexual harassment and microaggressions that happen to women daily (times too numerous to count in my experience) but I survived rape and sexual battery. And as a survivor, I can tell you that it has impacted me in ways that I will never shake. You learn that sexual assault is not so much about sex, but about power. So being forced to live in an environment where the majority of those charged to control your every move are men who thrive on their power adds a whole new level of terror. The threat of that happening again by men who consider you inhuman was always front of mind. I was not alone in my experience among this group of women. Out of every inmate I spoke to about this topic (I can easily say in a prison of roughly 175 women, I easily talked to at least 100, maybe more), only one had NOT experienced the trauma of violent sexual assault in her lifetime. Since every woman is asked this question specifically during intake, I promise you, those men who had access to all our paperwork, knew who we were. Remember when I said that they preyed upon the weak and punished the strong? That comes into play here in a big way. It didn't take much to know who the most vulnerable women were in our population, which is why I wasn't surprised to see the familiar names of certain officers in the press being accused of raping/sexually assaulting these women. And while I wasn't surprised, I was still incredibly affected. These are my sisters. We survived something so hard to describe, and we did it TOGETHER. I want to grab them and hug them and protect them from the shitty hot takes of the public who think that "you do the crime; you do the time" and that makes it ok to throw aside all humanity to subject "fucking scumbag felons" to cruel and unusual punishment. Here's a hot take. Now those bastards are also fucking scumbag felons. Prison will not be kind to them.

#### **APPENDIX B: TRANSCRIPT FOR HOW THE FBI LEARNED OF KATRINA**

Below is testimony from Special Agent Barclay of the FBI; the person asking the questions is United State Assistant Attorney Molly Priedeman. Melissa is another former inmate and survivor of the abuse perpetrated by Garcia.

Q. Why did you request footage for Katrina's cell?

A. So Lieutenant Putnam told me and another agent that he had received information from an inmate that Katrina was undressing for Garcia during his rounds.<sup>259</sup>

Cross examination of agent Barclay by defense attorney Mr. Reilly

Q. And were those obtained as a result of the report by Melissa?

A. Yes, in addition to another report we received as well.

Q. Who was that from?

A. Lieutenant Putnam.

Q. And what was the nature of that report?

A. He -- the nature of the report was that Katrina was -- undressed for Mr. Garcia during his rounds.<sup>260</sup>

### APPENDIX C: TABLES

PREA RIA table 1.1:<sup>261</sup>

**Table 1.1: Hierarchy of Sexual Victimization  
Types, Adult Facilities**

Level	Description	Type
1	Nonconsensual Sexual Acts High—Involving Injury, Force, or High Incidence	Any
2	Nonconsensual Sexual Acts Low—Involving No Injury and No Force, and Low Incidence	Any
3	"Willing" Sex with Staff	Staff on Inmate
4	Abusive Sexual Contacts High—Involving Injury or High Incidence	Inmate on Inmate
5	Abusive Sexual Contacts Low—Involving No Injury and Low Incidence	Inmate on Inmate
6	Staff Sexual Misconduct Touching Only	Staff on Inmate
<b>Definitions:</b>		
Nonconsensual Sexual Acts: unwanted contacts with another inmate or with a staff member that involved oral, anal, or vaginal penetration, or hand jobs.		
Abusive Sexual Contacts: unwanted contacts with another inmate that only involved touching of the inmate's buttocks, thigh, penis, breasts, or vagina in a sexual way.		
Touching Only: contacts with a staff member that only involved touching of the inmate's buttocks, thigh, penis, breasts, or vagina in a sexual way		
High Incidence: Report of 3 or more events		
Low Incidence: Report of 2 or fewer events.		

<sup>259</sup> Garcia Crim. Trial Tr. Supra note 21 at vol.5 803:17-20

<sup>260</sup> *Id.* at vol.5 831:14-21.

<sup>261</sup> PREA RIA, *supra* note 125 at 24.

PREA RIA table 4.3<sup>262</sup>**Nonconsensual Sexual Acts (High) in Adult Prisons and Jails, per Victim, in 2011 dollars<sup>88/</sup>**

Cost Element	Miller Value	Conf. Mult.	Serial Victim Mult.	2011 \$	RIA Value
Medical Care	\$700	1.00	3.00	1.1518	\$2,419
Mental Health Care	\$1,400	2.00	3.00	1.1518	\$9,675
Lost Work	\$2,800	0.00	3.00	1.1518	\$0
Property Damage	\$100	0.00	3.00	1.1518	\$0
Suffering and Lost Quality of Life	\$118,100	1.00	3.00	1.1518	\$408,069
STI	\$1,100	2.00	3.00	1.1518	\$7,602
Pregnancy	\$400	0.10	3.00	1.1518	\$138
Suicide Acts	\$8,200	1.25	3.00	1.1518	\$35,417
Substance Abuse	\$2,300	1.00	3.00	1.1518	\$7,947
Victim Services	\$100	1.00	3.00	1.1518	\$346
Inv./Adj.	\$500	1.00	3.00	1.1518	\$1,728
Sanctioning	\$2,100	1.00	3.00	1.1518	\$7,256
Earn. Loss	\$1,300	0.00	3.00	1.1518	\$0
<b>Total</b>	<b>\$139,100</b>				<b>\$480,595</b>

PREA RIA table 4.5<sup>263</sup>**Table 4.5: Victim Compensation Costs of Nonconsensual Sexual Acts (Low) in Adult Prisons and Jails, per Victim, in 2011 dollars**

Cost Element	Miller Value	Conf. Mult.	Serial Victim Mult.	2011 \$	RIA Value
Medical Care	\$700	0.00	1.00	1.1518	\$0
Mental Health Care	\$1,400	2.00	1.00	1.1518	\$3,225
Lost Work	\$2,800	0.00	1.00	1.1518	\$0
Property Damage	\$100	0.00	1.00	1.1518	\$0
Suffering and Lost Quality of Life	\$118,100	1.00	1.00	1.1518	\$136,023
STI	\$1,100	2.00	1.00	1.1518	\$2,534
Pregnancy	\$400	0.10	1.00	1.1518	\$46
Suicide Acts	\$8,200	1.25	1.00	1.1518	\$11,806
Substance Abuse	\$2,300	1.00	1.00	1.1518	\$2,649
Victim Services	\$100	1.00	1.00	1.1518	\$115
Inv./Adj.	\$500	1.00	1.00	1.1518	\$576
Sanctioning	\$2,100	1.00	1.00	1.1518	\$2,419
Earn. Loss	\$1,300	0.00	1.00	1.1518	\$0
<b>Total</b>	<b>\$139,100</b>				<b>\$159,392</b>

<sup>262</sup> *Id.* at 54.<sup>263</sup> *Id.* at 57. NCSA low: This is the same cost assessment for "Willing" sex with staff.